Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

BRET FREEMAN, PETITIONER

v.

NORFOLK SOUTHERN CORPORATION; NORFOLK SOUTHERN RAILWAY COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. By adopting a heightened standard for class certification, *i.e.*, requiring "concrete evidence of numerosity" under Federal Rule of Civil Procedure 23(a)(1), does the United States Court of Appeals for the Sixth Circuit's decision below demonstrate a marked departure from well-settled federal class certification standards?

II. By requiring the named plaintiff in a proposed class action to (i) identify and name putative class members, (ii) establish that putative class members suffered actual damages and (iii) demonstrate that putative class members possess bona fide claims, does the United States Court of Appeals for the Sixth Circuit's decision violate the *Eisen* rule, which prohibits district courts from conducting a preliminary inquiry into the merits of a class action suit?

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The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 2009 U.S. App. LEXIS 1455 (6th Cir. Jan. 22, 2009). The opinion of the United States District Court for the Eastern District of Tennessee reciting the findings of fact and conclusions of law following the trial is reported at 2007 U.S. Dist. LEXIS 53967 (E.D. Tenn. July 25, 2007). The opinion of the United States District Court for the Eastern District of Tennessee accepting the report and recommendation of the magistrate denying class certification is reported at 2005 U.S. Dist. LEXIS 34846 (E.D. Tenn. Nov. 15, 2005). The report and recommendation of the magistrate of the United States District Court for the Eastern District of Tennessee is reported at 2005 U.S. Dist. LEXIS 35092 (E.D. Tenn. Sept. 28, 2005).

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit, affirming the decision and judgment of the District Court, including the District Court's repeated denial of class certification, was issued on January 22, 2009. A timely petition for rehearing by the Petitioner was denied on March 26, 2009. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT PROVISIONS INVOLVED

Rule 23, Federal Rules of Civil Procedure (2008)

Rule 23. Class Actions

(a) PREREQUISITES. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) TYPES OF CLASS ACTIONS. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair

or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

STATEMENT

Few pretrial motions in our civil justice system elicit as much controversy as those requesting class certification. Since the emergence of the modern class action in the 1966 amendments to the Federal Rules of Civil Procedure, controversy has attended the certification of classes in such litigation. Over forty

years later, one would think that our courts would have resolved the nature of that determination as well as the permissible parameters for inquiry by the court. Unfortunately, however, that is not the case. Circuit splits abound on the prevailing standards for making class certification determinations. These inter-circuit conflicts present great and fundamental problems to litigants, to their lawyers and to the lower courts.

This case affords the Court with an opportunity to address an issue of national importance and clarify the standards for making class certification determinations. At present, as announced by opinions of the respective Circuit Courts of Appeal, the standards for making such determinations are dissimilar, providing little, if any, uniformity to district courts for making such decisions which can turn a case worth $200 into a case worth $200 million.

Plaintiff brought a private nuisance action seeking damages against a railroad for a train derailment which caused a chemical spill in Knoxville, Tennessee. The United States Court of Appeals for the Sixth Circuit ("Sixth Circuit") affirmed denial of class certification based solely on the plaintiff's purported failure to satisfy the so-called numerosity requirement of Rule 23(a)(1) of the Federal Rules of Civil Procedure.

In the latest of what has become an increasingly alarming number of Circuit Court decisions which raise the already arduous barrier for class certification, the Sixth Circuit eradicated what has heretofore been viewed as a minimal burden to establish numerosity or impracticability of joinder under the class action rule.

The Court, in a placid indictment of existing class action standards, saddles class plaintiffs with the undue dual burdens of establishing that their fellow putative class members have each (a) "suffered actual damages" and (b) possess "bona fide" legal claims – in order to satisfy Rule 23(a)(1)'s numerosity requirement.

While this Court has taken appeals of class action settlements in recent years, *e.g.*, *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591 (1997) and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), the Court has not decided a case involving the standards for making litigation-class certification determinations for over twenty-five years. Meanwhile, the federal Circuit Courts have weighed in with their own interpretations of Rule 23's requirements. Their opinions evoke differing standards across a broad spectrum, ranging from those which attempt to rigidly apply this Court's prior expressions on the issues to those which appear to strain to conveniently disregard this Court's rulings as mere dicta. Like the latter opinions, the decision of the Sixth Circuit below is forcefully representative of what can rightly be characterized as a "tightening of the reins" on proposed class actions.

The Sixth Circuit's opinion presents two separate but equally alarming analyses of Rule 23's requirements. The first concerns the level or weight of evidence required to satisfy the rule's numerosity requirement, while the second addresses the scope of inquiry into the underlying merits of the class action claim. Initially, while so much of the focus in class actions is on Rule 23(b) provisions, the Sixth Circuit found that the plaintiff had not demonstrated that the

number of people allegedly harmed by a chemical spill from a 2002 Norfolk Southern train derailment in Knoxville, Tennessee was sufficient to make joinder impractical. The incident led to a mandatory evacuation of 963 homes within a 1.3-mile radius of the site and a voluntary evacuation of 6,047 homes within a 3-mile radius.

Decisions by the Circuit Courts of Appeal routinely require class action plaintiffs to come forward with "*some evidence or reasonable estimate* of the number of purported class members." *See e.g.*, *Pederson v. La. State Univ.*, 213 F.3d 858, 868 (5th Cir. 2000) (emphasis added). However, in rejecting plaintiff's numerosity claims, the Court adopted a rule commanding class action plaintiffs to satisfy what appears to be a substantially-heightened burden, demanding "*concrete evidence of numerosity.*" Here, the Sixth Circuit's rigid, uncompromising analysis of the numerosity and impracticability of joinder requirements and its application of those unbending requirements demonstrate just how far the Court veered from acceptable standards.

The implications of the Sixth Circuit's decision are suffocating to class action plaintiffs, exacting on them increased burdens of producing the number, name and identity of other potential class members and determining the strength of class members damage claims at the class certification stage. By stating that a class could not be certified regardless of size, the Court's opinion will have a chilling effect on the rights of future potential class members in similar cases.

Second, like a number of other recent opinions from Circuit Courts across the country, the Sixth Circuit's opinion represents a clear deviation from this Court's long-settled rule that in addressing Rule 23's requirements, courts refrain from engaging in a preliminary review of the merits. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974). The Sixth Circuit's analysis, in part, turned on its imposition of a standard which required the named plaintiff to establish that other putative class members had "suffered actual damages" or stated *bona fide* claims. Thus, the opinion directly conflicts with the *Eisen* rule by imposing an undue burden on the named plaintiff to establish whether putative class members have suffered actual damages or state "bona fide claims" at the class certification stage of the proceedings.

Therefore, this case raises recurring issues of far-reaching national importance. Both requirements imposed by the Sixth Circuit – the need for concrete evidence of numerosity and the need to demonstrate that putative class members have suffered actual damages or have bona fide claims – significantly, unreasonably and unjustifiably heighten the existing burdens on class action plaintiffs.

Accordingly, acceptance of this Petition is necessary to address these varying standards, which naturally have resulted in competing standards for making class certification decisions. Exercise of this Court's supervisory authority over our lower courts is also warranted to establish uniformity among the Circuit Courts with respect to these standards. The Court – which has not delved into this area of class

action jurisprudence in twenty-five years – should grant certiorari to clarify the standards for class certification determinations, and particularly, the determinations by the Sixth Circuit below, which promise to have profound ramifications for current and future cases seeking class action status under Rule 23.

Factual Background

On Sunday, September 15, 2002 a train owned and operated by Norfolk Southern Corporation and its subsidiary Norfolk Southern Railway ("Norfolk Southern") derailed in Knox County, Tennessee. A tanker filled with sulfuric acid leaked, forming a cloud of water and sulphuric acid above portions of Blount and Knox County. Knox County's emergency management agency ordered a mandatory evacuation of residents living within a 1.3-mile radius of the site and a voluntary evacuation of residents within a 3-mile radius. The evacuation was partially lifted at 9:00 p.m. on Monday and entirely lifted at 7:00 a.m. on Tuesday, September 17. Pet. App. 2a.

Affected residents either had to leave their homes and businesses, were forced to "shelter in place,"[1] or, if they were away from their homes, could not return. Their lives were disrupted and many incurred out-of-pocket expenses and other economic losses, including lodging, supplies, clothes, medicines, and transportation. Norfolk Southern set up claim

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[1]The Magistrate defined this phrase as meaning "that if people chose not to leave their homes, then they were to stay there and not come and go, while also turning off their air conditioning and closing all doors and windows." Pet. App. 30a.

centers to reimburse residents for out-of-pocket and other evacuation-related expenses. 827 households out of 963 households within the 1.3-mile radius received compensation. 1,037 out of 6,047 households within the 3-mile radius received compensation. Pet. App. 2a. Plaintiff's reasonable estimation was that "3 people to a household is a fair number," and thus, "21,030 people were within the three mile zone," leaving over approximately 15,000 people who have not been compensated within the 3 mile area. Pet. Ap. 21a-22a.

Plaintiff and his family lived approximately 1.1 miles from the derailment site. They evacuated their home without time to pack. Freeman missed several days of work and incurred out-of-pocket expenses. Pet. App. 3a.

Proceedings Below

This class action for private nuisance was filed on June 3, 2003 in the Circuit Court for Blount County, Tennessee by the original plaintiff, Cynthia Turnage, seeking damages on behalf of persons and businesses who suffered economic losses as a result of the derailment. Norfolk Southern subsequently removed the case to federal court. The complaint was amended to add Freeman.

Plaintiffs unsuccessfully moved to certify a class, with the District Court ultimately accepting the Magistrate's conclusion that Plaintiffs had not proved that the class was so numerous as to make joinder impracticable. Pet. App. 3a-5a, 32a-33a. The Magistrate found that the plaintiffs "produced little

more than sheer speculation to show that residents in [the affected] area, other than the named plaintiffs, ha[d] in fact suffered damages as a result of the derailment" or that "those residents who ha[d] already received compensation . . ha[d] not been fully compensated for their injuries." Pet. App. 3a-4a. The Magistrate further noted that "because the potential class members are in such a limited geographical area, joinder of any potential plaintiffs . . . would be relatively easy." Pet. App. 4a. Following a bench trial on Freeman's individual claim, the District Court awarded him $3,480. Pet. App. 5a.

On appeal, the Sixth Circuit affirmed and found that Freeman had not met his burden to demonstrate impracticability of joinder, essentially casting him as "a class of one." First, the Court reasoned that Freeman had failed to establish "concrete" proof that Rule 23(a)(1) had been satisfied. *See, e.g.*, Pet. App. 7a ("Freeman has not produced concrete evidence of numerosity . . . ."); Pet. App. 9a ("Freeman had ample opportunity during the course of this protracted litigation to supply concrete evidence of numerosity if there were any such evidence to be had."); and Pet. App. 16a ("the task of gathering concrete evidence of numerosity should not have been difficult"). Second, the Court found that Freeman had failed to show that others among the evacuated residents had "suffered actual damages." Pet. App. 8a.

Petitioner filed a motion for panel rehearing. The Sixth Circuit denied the petition for rehearing on March 26, 2009. Pet. App. 46a-47a. This petition follows.

REASONS FOR GRANTING PETITION

A. By Adopting a Heightened Burden for Plaintiffs under Federal Rule of Civil Procedure 23, Requiring "Concrete Evidence of Numerosity," the Sixth Circuit Demonstrated a Marked Departure from Well-Settled Class Certification Standards Which Cannot Be Reconciled with Precedent.

It has been long-settled that the issue of numerosity "is substantially unrelated to the merits. The relevant inquiries for determining numerosity are factors such as the number of members of the class, their places of residence, and the ease of locating them and joining them in an individual action. But by and large, the inquiry is not merits-based." Geoffrey P. Miller, Review of the Merits in Class Action Certification, 33 Hofstra L. Rev. 51 (2004). However, the Sixth Circuit's adoption of a more exacting standard for class certification plaintiffs – requiring "concrete evidence" of numerosity – represents a growing and disturbing trend to unreasonably curb class litigation by imposing greater burdens on class action plaintiffs, misinterprets Rule 23(a)(1) and conflicts with the law of other Circuits.

It is important to put the numerosity issue in this case into full perspective against the backdrop of recent class certification decisions across the country, which apply Rule 23 more stringently than prior cases. In the District Court, to demonstrate numerosity, the Plaintiff relied upon figures provided by defense counsel and cited by the District Court. Pet. App. 21a.

Those statistics demonstrated that setting aside 827 households who were paid by Norfolk Southern, still 136 households within the mandatory evacuation zone did not receive payment. Of those households which fell outside of the 1.3 mile radius, but which fell within the 3 mile radius, 5,010 households remained unpaid. Thus, a total of 136 households within the 1.3 mile radius and 5,010 more households within the 3-mile radius remained eligible for class membership. Pet. App. 21a. Despite these facts, the Sixth Circuit held that because the Plaintiff failed to produce "concrete evidence of numerosity," his statistics were insufficient to satisfy Rule 23(a)(1). Pet. App. 7a.

1. The Sixth Circuit's opinion excessively deviates from accepted standards for determining numerosity and impracticability of joinder.

The burden to establish numerosity is minimal.[2] However, the Sixth Circuit unexplainedly imposed a substantially greater burden, requiring Plaintiff to establish "*concrete evidence of numerosity.*"[3] To be

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[2]"There is enormous disparity among the decisions as to the threshold size of the class that will satisfy the Rule 23(a)(1) prerequisite." Alba Conte & Herbert Newberg, 1 *Newberg's On Class Actions* 3rd, §3.03, at 3-13. For example, classes with as few as 14 plaintiffs have been upheld. *Id.* at 3-14-15 (citing cases).

[3]Counsel has located four other opinions – from the Federal Court of Claims, Northern District of Illinois and the Eastern District of Pennsylvania – imposing a "concrete evidence of numerosity" standard on class action plaintiffs: *Fisher v. United States*, 69 Fed. Cl. 193 (2006) ("plaintiff's Motion for Class Certification must be denied based upon numerosity alone," finding that plaintiff has failed to provide *concrete evidence* that a single prospective class

sure, courts do not require plaintiffs to allege the exact number or identity of class members; rather, plaintiffs must establish that joinder is impracticable through "some evidence or *reasonable estimate* of the number of purported class members." *Pederson v. La. State Univ.*, 213 F.3d 858, 868 (5th Cir. 2000) (emphasis added).

Further, the Sixth Circuit's decision – presumably to be applied to every proposed class action in the Circuit – all but eviscerates the well-settled recognition of common sense estimates, assumptions and inferences. Applying a harsh and rigid "concrete evidence" standard, the Sixth Circuit discounted Plaintiff's good faith estimates, failed to consider his

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member other than plaintiff exists.") (emphasis added); *Lengle v. Attorneys' Title Guaranty Fund, Inc.*, 2002 U.S. Dist. LEXIS 18398, *11-12 (N. D. Ill. Sept. 26, 2002) ("[Plaintiff] has failed to offer any *concrete evidence* that there are so many potential class members that 'joinder is impractical.' Fed. R. Civ. P. 23(a)(1) . . . . Accordingly . . . the requirement of Rule 23(a)(1) has not been satisfied.") (emphasis added); *Mungia v. Tony Rizza Oldsmobile, Inc.*, 2001 U.S. Dist. LEXIS 24527, *8 (N.D. Ill. Sept. 17, 2001) ("In the absence of more *concrete evidence* relating to the number of people who purchased cars, applied for credit and then were denied credit without notice, this court cannot conclude that the numerosity requirement for class certification is met.") (emphasis added); *Vinson v. Seven Seventeen Hb Phila. Corp.*, 2001 U.S. Dist. LEXIS 25295, *55-56 (E.D. Pa. Oct. 31, 2001) ("In their second argument, defendants contend that plaintiffs have relied on conclusory allegations regarding the size of the class without demonstrating, through *concrete evidence* that the number of black employees who have suffered from the alleged discrimination is so great that joinder of all members would be inapplicable. Upon review of the relevant jurisprudence, the Court finds that this argument misunderstands the numerosity requirement.") (emphasis added)

"common sense" assumptions, rejected every reasonable inference which could have easily been drawn in Plaintiff's favor from record facts, and ignored Plaintiff's pleading allegations. For instance, while not every one of the thousands of households noted by Plaintiff may have suffered out-of-pocket losses, common sense allows that many residents temporarily fled their homes and were inconvenienced to the point of suffering actual damages, e.g., out-of-pocket losses.[4] To be sure, Plaintiff's failure to name and identify class members or pinpoint the precise size of the proposed class should not have been – but was – fatal to class certification.

Significantly, the Sixth Circuit's ill-reasoned decision also strongly suggests that a class of residents who suffer economic injuries resulting from similar nuisance may never be certified. *See* Pet. App. 6a ("*Regardless of the actual number of plaintiffs in this case*, their proximity to each other and the discrete and obvious nature of the harm make identifying and

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[4]In a telling observation, the District Court held,

> "it is undisputed that the defendants interfered with the use and enjoyment of plaintiff's property. Defendants, themselves, ordered an evacuation in light of fuming Oleum spreading across Knox and Blount County. Any inconvenience associated with evacuating the property would proceed from the direct injury to the usable value of the premises. This is not a situation where a plaintiff did not present sufficient evidence that a nuisance affected his or her property. Accordingly, inconvenience damages can be properly assessed against the defendants."

Pet. App. 41a.

contacting them relatively easy.") (emphasis added). Put simply, taking the Sixth Circuit's finding to its logical conclusion, nuisance classes of nearby landowners – no matter how large – could never be certified, as class members are too geographically close, too easily identified, and the nature of their harm too obvious.[5]

Accordingly, by imposing a standard which requires plaintiffs to establish numerosity and impracticability of joinder by "concrete evidence," the Sixth Circuit so far departed from accepted standards that review is required. This Court should grant certiorari and exercise its supervisory authority of the lower courts by resolving the problem presented by the adoption of unreasonable and undue burdens on class action plaintiffs.

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[5] "Though some courts have said that a class action determination may not be based on mere speculation, the prevailing view is that the plaintiff need not allege the exact number or identity of class members. A contrary rule would foreclose most class litigation because of the impossibility of identifying all class members at the outset would make large class suits burdensome because of the great expense involved in identifying members. While the plaintiff has the burden of showing that joinder is impracticable, a good faith estimate should be sufficient when the number of class members is not readily ascertainable."

Newberg's, §3.04, at 3-18-19 (footnotes and citations omitted).

2. The Sixth Circuit's opinion disregards the fact that this is a "negative value" suit, where the stakes to each class member are too slight to repay the costs of the suit.

In addition to creating a new, more exacting burden on class action plaintiffs, the Sixth Circuit's opinion also failed to recognize well-settled precedent which provides that the most compelling rationale for the class action vehicle is the existence of a "negative value suit," *see Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 420 (5th Cir. 1998), where the stakes to each member are too slight to repay the cost of the suit. For instance, the District Court below valued the most common claim of class members – damages for inconvenience – at $500 per day for 3 days for the Plaintiff. Pet. App. 43a-44a. Considering the minimal damages involved versus the complexity and expense of litigating, most putative class members could not, would not (and in fact, did not) proceed without certification. Therefore, the financial disincentives to initiating a lawsuit such as this create a significant hardship for prospective plaintiffs. But a class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.

> "When class members are unable to sue individually, does this fact make permissive joinder a practicable alternative to the class device? Virtually all courts have answered in the negative because of the accepted recognition

> that the Rule 23 class action device was specifically designed, among other things, to accommodate representative suits for groups of persons with small individual claims who otherwise would have no access to individual judicial relief."

Alba Conte & Herbert Newberg, 1 *Newberg's On Class Actions* 3rd, §3.05, at 3-34 (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985) ("Class actions also may permit the plaintiffs to pool claims which would be uneconomical to litigate individually")). Accordingly,

> [i]n a very real sense, only those who are financially able to join a suit, and who know they have a claim, can realistically use the permissive joinder device. As one commentator has noted: "If the persons are unable to sue, then joinder may be deemed impractical because permissive joinder presupposes 'a group of economically powerful parties who are obviously able and willing to take care of their own interests.'"

Newberg's, §3.05, at 3-35-36 (footnotes and citations omitted).

B. The Sixth Circuit's Decision Excessively Deviated from the *Eisen* Rule by Compelling the Plaintiff to Establish That Other Putative Class Members Had "Suffered Actual Damages" or Possessed "Bona Fide Claims."

The Sixth Circuit in this proposed private nuisance class action rejected the Plaintiff's arguments

on numerosity and impracticability of joinder, in part, by deciding to inquire into whether other putative class member-residents had suffered actual damages or whether such residents possessed bona fide legal claims against the railroad. Notwithstanding the fact that any resident who was evacuated or chose to voluntarily evacuate suffered some type of inconvenience, *i.e.*, damages, the Court's decision to make a preliminary inquiry into the merits of the putative class members' damage claims and to test the viability of their legal claims ran afoul of this Court's long-settled prohibition against making such an inquiry at the class certification stage.

1. The *Eisen* rule – federal courts may not "conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."

Thirty-five years ago, in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), this Court declared that federal courts may not "conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Id.* at 177. This proscription – sometimes referred to as the "*Eisen*" rule – has become a pillar of class action practice over the past four decades. The rule can have a crucial influence on whether a class is certified and – given the importance of certification, on the ultimate success or failure of the litigation.

Aside from *Eisen*, the Court has provided limited guidance with respect to the extent of a plaintiff's proof required to establish the elements of

Rule 23 and the scope of a court's inquiry in making determinations for purposes of Rule 23.[6] For instance, four years after *Eisen*, in *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469, 98 S. Ct. 2454, 57 L. Ed. 2d 351 (1978), the Court noted that the class certification inquiry "generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'"

2. The rule in *Falcon* – sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question.

Four years later, in *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 161, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982) – the Court's most recent pronouncement on class certification standards – the Court stated that a class could only be certified "if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) [had] been satisfied."

In *Falcon*, the Court recognized that probing behind the pleadings at the class certification stage was necessary to ensure actual, not presumed, conformance with the certification requirements of Rule 23. *Id.* at

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[6]For example, the Court in *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 315-16 (3rd Cir. 2008) described this Court's rulings on the standard of proof for class certification as offering "little guidance" (footnote omitted), noting that the Court described the inquiry as a "rigorous analysis" (citing *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)) and a "close look" (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997), "but it has elaborated no further."

160 ("[s]ometimes issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claim, and sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question."). Thus, while courts are commanded to conduct a "rigorous analysis," *Falcon*, 457 U.S. at 161, class certification is a procedural determination and should not include inquiry into the merits of the plaintiff's claims. *Eisen*, 417 U.S. at 177-78.

3. Attempting to Reconcile *Eisen* and *Falcon*

For twenty-seven years, district courts have attempted to reconcile *Eisen's* prohibition on preliminary merits inquiries with *Falcon's* requirement that a court conduct a "rigorous analysis" that probes beyond the pleadings. As such, many district courts have required plaintiffs to submit evidence to establish the elements of Rule 23, but failed to articulate a clear standard of proof that plaintiffs must meet. *See, e.g., In re Playmobil Antitrust Litigation*, 35 F. Supp. 2d 231 (E.D. N.Y. 1998). In that regard, courts have invoked various characterizations of the requisite quantum of evidence, ranging from "some quantum of evidence" to "a specific presentation" to "some showing" that the elements of Rule 23 have been met. *See, e.g., Attenborough v. Const. and General Bldg. Laborers' Local 79*, 238 F.R.D. 82 (S.D. N.Y. 2006); *Robinson v. Sears, Roebuck and Co.*, 111 F. Supp. 2d 1101 (E.D. Ark. 2000). Some district courts have even observed that the appellate courts have yet to clearly articulate

the standard of proof for class certification motions and therefore conclude that the standard is within their discretion. *See, e.g., Armstrong v. Weichert Realtors*, 2006 WL 1455781 (D. N.J. 2006); *Kane v. United Independent Union Welfare Fund*, 1998 WL 78985 (E.D. Pa. 1998); *Gilchrist v. Bolger*, 89 F.R.D. 402 (S.D. Ga. 1981), aff'd, 733 F.2d 1551 (11th Cir. 1984).

Courts have been even less clear or consistent where the issues relevant to the Rule 23 inquiry overlap with issues relevant to the merits of the underlying claim. For example, many courts have held that the factual allegations in the complaint are presumed to be true for purposes of a class certification motion. *See, e.g., Blackie v. Barrack*, 524 F.2d 891, 901 & n.17 (9th Cir. 1975) (noting that court may not conduct preliminary inquiry into the merits and that a judge must accept plaintiffs' allegations as true); *Harman v. LyphoMed, Inc.*, 122 F.R.D. 522, 524 (N.D. Ill. 1988) ("[i]n a ruling on a motion for class certification, 'the allegations are taken as true and the merits of the complaint are not examined'") (internal quotations omitted). Arguably, these courts have viewed the *Eisen* prohibition on merits inquiries to constrain the *Falcon* admonition to "probe beyond the pleadings." Accordingly, it would seem that these courts may require evidentiary submissions, or proof of some kind, as to the elements of Rule 23, but have permitted the plaintiff to rely on the allegations in the complaint where the Rule 23 inquiry requires the resolution of a merits-based issue. *See, e.g., In re IGI Securities Litigation*, 122 F.R.D. 451, 456 n.4 (D.N.J. 1988) (in the securities fraud context "the issue of reliance goes to the merits [and] the court cannot

inquire into the merits in determining class certification"); *Brinkerhoff v. Rockwell Intern. Corp.*, 83 F.R.D. 478, 481 (N.D. Tex. 1979) ("It is well settled that the merit of the claim [is] irrelevant at the ... certification hearing."); *Briggs v. Brown & Williamson Tobacco Corp., Inc.*, 414 F. Supp. 371, 374-75 (E.D. Va. 1976) (court is "precluded from making, a preliminary inquiry into the merits...for the purposes of certification").

4. Inter-circuit conflicts interpreting *Eisen*

In view of all of this, it is not surprising that there are important inter-circuit conflicts regarding interpretation of the *Eisen* rule. Some courts, for instance, have interpreted the Court's mandate broadly, effectively treating a motion for class certification like a motion to dismiss under Rule 12(b)(6). Other courts, including most of the recent cases, have held otherwise, ruling that a plaintiff seeking class certification must prove, with evidence, any contested elements under Rule 23, whether or not those elements overlap with an issue going to the merits – and that *Eisen* means only that a court should not evaluate the merits to determine whether a case is "worthy" of certification. The conflict is a serious practical problem.

Lately, numerous appellate decisions have addressed the standard of review for class certification motions. The decisions of the Court of Appeals for the Second Circuit in *In re Initial Public Offering Securities Litigation (IPO)*, 471 F.3d 24 (2d Cir. 2006),

clarified on denial of reh'g, 483 F.3d 70 (2d Cir. 2007) and the Court of Appeals for the Fifth Circuit in both *Regents of the University of California v. Credit Suisse First Boston (USA), Inc. (Enron)*, 482 F.3d 372 (5th Cir. 2007), petition for cert. filed, 75 U.S.L.W. 3557 (U.S. Mar. 5, 2007) and *Oscar Private Equity Investments v. Allegiance Telecom, Inc. (Allegiance)*, 2007 WL 1430225 (5th Cir. 2007) reflect a growing trend, exhibited just as strongly by the Sixth Circuit below, to toughen the standard for class certification.

To be certain, when class criteria and merits overlap, the different circuits appear to articulate the necessary degree of inquiry into ranges along a spectrum which suggests perceptible differences. At least the Second, Fourth, Fifth, and Seventh Circuits coalesce around the more rigorous end of this spectrum, forbidding district courts from relying on plaintiffs' allegations of sufficiently common proof and requiring courts to make specific findings that each Rule 23 criterion is met. *IPO*, 471 F.3d at 33, 41 (requiring a "definitive assessment of Rule 23 requirements," including the resolution of relevant factual disputes);[7] *Unger v. Amedisys Inc.*, 401 F.3d 316, 321-22 (5th Cir. 2005) (requiring courts to find facts favoring class certification through the use of "rigorous, though

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[7]The Second Circuit Court of Appeals in *IPO* reasoned that *Eisen* had been misconstrued by other courts in that *Eisen* involved only a proscription on a merits inquiry with respect to issues that were unrelated to Rule 23. *IPO*, 471 F.3d at 41. According to the court, a Rule 23 analysis involves "threshold issues" of mixed questions of law and fact that are similar to the resolution of preliminary issues in a litigation, such as personal and subject matter jurisdiction. *Id.* at 40.

preliminary, standards of proof"); *Gariety v. Grant Thornton*, LLP, 368 F.3d 356, 366 (4th Cir. 2004) (requiring that "the factors spelled out in Rule 23 . . . be addressed through findings"); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675-76 (7th Cir. 2001) (requiring "whatever factual and legal inquiries are necessary under Rule 23" to "resolve the disputes before deciding whether to certify the class").[8] The Seventh Circuit clarified that (1) nothing in *Eisen* prevented a court from "looking beneath the surface of the complaint" and (2) that, under *Falcon*, courts were sometimes required to probe behind the pleadings before coming to rest on the certification question. *Szabo*, 249 F.3d at 677.

In contrast, at the other end of the spectrum, the recent decision of the Court of Appeals for the Ninth Circuit in *Dukes v. Wal-Mart, Inc. (Dukes)*, 509 F.3d 1168, 1174-75, 1180-82 (9th Cir. 2007), reh'g en banc granted, Nos. 04-16688, 04-16720, 2009 WL 365818 (9th Cir. Feb. 13, 2009), suggests a less stringent standard for plaintiffs seeking class certification, particularly where merits considerations overlap with Rule 23 criteria. The Court held that "[t]he district court was on very solid ground here as it has long been recognized that arguments evaluating the weight of evidence or the merits of a case are improper at the class certification stage." *Dukes*, 474 F.3d at 1227.

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[8]Not long ago, the First Circuit held that it could not "put blinders on as to an issue simply because it implicates the merits of the case." *Smilow v. Sw. Bell Mobile Sys., Inc.*, 323 F.3d 32, 38 (1st Cir. 2003).

Other cases are equally illustrative of the differing standards being adopted and applied by our Circuit Courts. For instance, the Third Circuit sometimes requires an inquiry into and preliminary resolution of disputes, but they do not require findings and do not hold that such inquiry will always be necessary. *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 166 (3d Cir. 2001) ("A class certification decision requires a thorough examination of the factual and legal allegations."); *id.* at 168 ("In reviewing a motion for class certification, a preliminary inquiry into the merits is sometimes necessary to determine whether the alleged claims can be properly resolved as a class action."). *See also Johnston v. HBO Film Management, Inc.*, 265 F.3d 178 (3d Cir. 2001) (citing *Newton*, held that a preliminary inquiry into the merits of the class certification stage is sometimes necessary to determine whether the alleged claims can properly be resolved as a class action).[9]

Likewise, in *Blades v. Monsanto Co.*, 400 F.3d 562 (8th Cir. 2005), the Eighth Circuit noted that, under *Falcon*, "a court must conduct a limited preliminary inquiry, looking behind the pleadings" in order to determine whether the requirements of Rule 23 have been met. *Id.* at 566. The Court held that a preliminary

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[9]More recently, the Third Circuit in *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 316-17 (3rd Cir. 2008) stated, "An overlap between a class certification requirement and the merits of a claim is no reason to decline to resolve relevant disputes when necessary to determine whether a class certification requirement is met." The Court held that it must resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits – including disputes touching on elements of the cause of action." *Id.* at 307.

inquiry at the certification stage "may require the court to resolve disputes going to the factual setting of the case, and such disputes may overlap the merits of the case." *Id.* at 567.[10]

By comparison, the First and D.C. Circuits have noted the principles in both *Eisen* and *Falcon*, in that they recognized *Eisen's* prohibition on merits inquiry, but stated that *Eisen* did not preclude a district court's "consideration of matters beyond the pleadings to determine whether a claim or defense...is susceptible of resolution on a classwide basis." *See In re PolyMedica Corp. Securities Litigation*, 432 F.3d 1 (1st Cir. 2005); *Wagner v. Taylor*, 836 F.2d 578 (D.C. Cir. 1987); *McCarthy v. Kleindienst*, 741 F.2d 1406 (D.C. Cir. 1984).

Consequently, it is clear that many Circuit and District Courts are engaging in more stringent reviews of the merits, while others continue to hold steadfast to the rule announced in *Eisen*. Significantly, the degree to which a court will engage in a merits inquiry at the certification stage will likely have a significant effect on a plaintiff's ability to maintain a suit as a class action. Nevertheless, even the court in *IPO* would find that the court oversteps its proper bounds if it conducts the sort of free-floating merits inquiry into damages and the

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[10]Similar decisions were issued by the Sixth, Tenth, and Eleventh Circuits. *See In re American Medical Systems, Inc.*, 75 F.3d 1069 (6th Cir. 1996); *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280 (10th Cir. 1999); *Thiessen v. General Electric Capital Corp.*, 267 F.3d 1095 (10th Cir. 2001); *Love v. Turlington*, 733 F.2d 1562 (11th Cir. 1984); *Cooper v. Southern Co.*, 390 F.3d 695 (11th Cir. 2004), cert. denied, 126 S. Ct. 478, 163 L. Ed. 2d 363 (U.S. 2005).

merits of class members' claims as erroneously undertaken by the Sixth Circuit – one untethered to a legitimate Rule 23 requirement.

5. The Sixth Circuit's class certification analysis improperly burdens the Plaintiff with the requirement of establishing whether other class members have suffered actual damages and possess bona fide legal claims.

In the end, the Sixth Circuit's ill-reasoned and unwise analysis and conclusion in this case cannot be squared with this Court's oft-repeated admonition that federal courts may not "conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action," *Eisen*, at 177, as it was colored by an improper preliminary inquiry into damages, wrongly imposing a burden on the Plaintiff to actually identify and name others who possessed "bona fide claims."[11] Like other decisions disregarding *Eisen* discussed above, the Sixth Circuit's analysis fundamentally crossed the *Eisen* rule and the Court should grant certiorari to exercise its supervisory authority on the lower courts and resolve the inter-circuit conflicts in class certification standards.

CONCLUSION

To be certain, the Sixth Circuit's decision creates a federal precedent (1) substantially increasing the burden of class action plaintiffs, requiring them to establish numerosity by "concrete evidence," and (2) allowing the district court to delve into the merits of the claims of putative class members and determine whether such putative class members have suffered actual damages or possess bona fide claims.

For the foregoing reasons, the petition for a writ of certiorari should be granted. The Court may also wish to consider summary reversal.

Respectfully submitted,

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[11]Courts must not attempt to determine whether potential class members will state "bona fide claims" at this stage of the proceedings. *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 560 (6th Cir. 2007).

(any footnotes trail end of each document)
NOT RECOMMENDED FOR FULL-TEXT PUBLICATION.

No. 07-6033
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CYNTHIA TURNAGE,
Plaintiff,
and
BRET FREEMAN,
Plaintiff-Appellant,
v.
NORFOLK SOUTHERN CORPORATION;
NORFOLK SOUTHERN RAILWAY COMPANY,
Defendants-Appellees.

January 22, 2009, Filed

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE.

BEFORE: SILER, BATCHELDER, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. Cynthia Turnage and Bret Freeman sued Norfolk Southern for private nuisance caused by a train derailment and subsequent chemical spill, and sought to certify a class. The district court denied their motion for class certification because the plaintiffs did not demonstrate that the number of people who had been harmed by the spill, but not fully compensated, was sufficiently numerous to make

joinder impracticable. Freeman now appeals. Because the district court did not abuse its discretion when it found that Freeman failed to demonstrate impracticability of joinder, we affirm.

I.

On Sunday, September 15, 2002, at approximately 11:20 a.m., a train owned and operated by Norfolk Southern Corporation and its subsidiary Norfolk Southern Railway ("Norfolk Southern") derailed in Knox County, Tennessee. A tanker filled with sulfuric acid leaked, forming a cloud of water and sulphuric acid above portions of Blount and Knox County. The Knox County emergency management agency ordered a mandatory evacuation of residents living within a 1.3-mile radius of the derailment site and a voluntary evacuation of residents living within a 3-mile radius. Norfolk Southern dispatched emergency hazardous material cleanup crews to the accident site to neutralize the leaking sulphuric acid. The evacuation was partially lifted at 9:00 p.m. on Monday and entirely lifted at 7:00 a.m. on Tuesday, September 17.

Following the derailment, Norfolk Southern set up claim centers to allow those affected by the accident to receive immediate reimbursement for out-of-pocket expenditures for food, clothing, lodging, and other evacuation-related expenses. According to Norfolk Southern's records, on which Freeman has chosen to rely, there were 963 households located in the 1.3-mile radius, of which 827 households received some form of compensation, and an additional 6047 in the 3-mile radius, of which 1037 received compensation.

Freeman and his family lived approximately 1.1 miles from the derailment site. They evacuated their home without enough time to pack and stayed for several days with Freeman's in-laws. Despite the end of the evacuation, which was widely announced through broadcast and print media, Freeman and his family did not return home until Wednesday. As a result, Freeman was unable to work Sunday through Wednesday and incurred out-of-pocket expenses for food and personal items. He also partially drained and refilled his swimming pool and power washed his house, boats, and cars after his return.

Cynthia Turnage, the original plaintiff in this suit, filed a class action lawsuit against Norfolk Southern on June 3, 2003, in the Circuit Court for Blount County, Tennessee. Turnage sought compensatory and punitive damages on behalf of a class of all persons and businesses who suffered economic losses as a result of the train derailment. Norfolk Southern subsequently removed the case to federal court. Turnage amended the complaint on August 21, 2003, adding Bret Freeman and Donn Steltzer as additional class representatives. Donn Stelzer died on August 26, 2003, and was removed as a plaintiff.

Plaintiffs filed their first motion for class certification on August 21, 2003. On June 21, 2004, the district court denied the motion without prejudice as premature. Plaintiffs filed a renewed motion for class certification on March 30, 2005. The matter was referred to a magistrate, who issued a report and recommendation that the motion be denied because the plaintiffs had not proved that the class was so numerous as to make joinder impracticable. First, the magistrate noted that

the plaintiffs "produced little more than sheer speculation to show that residents in [the affected] area, other than the named plaintiffs, ha[d] in fact suffered damages as a result of the derailment" or that "those residents who ha[d] already received compensation . . . ha[d] not been fully compensated for their injuries." Second, the magistrate noted that "because the potential class members are in such a limited geographical area, joinder of any potential plaintiffs . . . would be relatively easy." The district court accepted the magistrate's report and recommendation in whole, and issued an order on November 15, 2005, denying class certification. The parties thereafter entered into a stipulated agreement that dismissed all claims by Cynthia Turnage and Freeman's claim with respect to punitive damages.

Throughout the case, the plaintiffs filed multiple amended complaints, renewed motions, and clarifying motions. Many of these filings offered new characterizations of the class that the plaintiffs purported to represent, causing the class definition to go through as many as seven iterations during the course of the litigation. The magistrate, primarily relying on the plaintiffs' third amended complaint, considered and rejected a class defined as:

> All persons (1) who evacuated their real property and/or "sheltered in place," and/or were prevented from returning to their homes and (2) who suffered all available nuisance damages, including economic losses and inconvenience, as a result of, and within a three mile radius from, the derailment and toxic spill.

Freeman renewed the motion to certify a class on February 14, 2007, less than a week before the case was set for trial on the issue of his damages. The class Freeman sought to certify at that point was "all persons who were evacuated from the surrounding area." The court held a hearing two days later and denied the motion, referring back to the reasoning in the magistrate's report and recommendation. On July 25, 2007, following a bench trial, the district court entered an order of final judgment awarding Freeman $ 3480. Freeman now appeals the court's refusal to certify the class defined in his last motion to certify.

II.

The district court did not abuse its discretion when it found that Freeman did not meet his burden to demonstrate impracticability of joinder. The court properly denied class certification for failure to meet Federal Rule of Civil Procedure 23(a)(1), which requires the plaintiff to demonstrate affirmatively the impracticability of joinder as a prerequisite to certification. *In re American Medical Systems, Inc.*, 75 F.3d 1069, 1079 (6th Cir. 1996). Two factors weigh strongly against Freeman: first, the ease of identifying potential plaintiffs due to their tight geographical proximity to each other and the discrete nature of the harm, and second, the speculative nature of the class size. The district court has broad discretion to decide whether to certify a class, *id.*, and we do not disturb the district court's determination here.

Unlike some proposed classes that are spread throughout a city, state, or even the entire country, every potential plaintiff in this case lives within a three-

mile radius. And unlike some harms that take place over long spans of time and require years to materialize, the harm in this case occurred at one brief point in time and was immediately obvious in its effects. Regardless of the actual number of plaintiffs in this case, their proximity to each other and the discrete and obvious nature of the harm make identifying and contacting them relatively easy. Federal Rule of Civil Procedure 23(a)(1) requires as a prerequisite to class action that "the class [be] so numerous that joinder of all members is impracticable." While this requirement is commonly referred to as a "numerosity" requirement, the real issue is whether the plaintiff seeking class certification has demonstrated impracticability of joinder. *In re American Medical Systems*, 75 F.3d at 1079. While large numbers may, in many cases, indicate impracticability of joinder, numbers are not a perfect predictor. Rather than naming a specific number, Rule 23 places the size of the class in the context of actual impracticability of joinder. When considering whether joinder would be practicable in a given case, courts may consider "ease of identifying members and determining addresses, ease of service on members if joined, [and] geographical dispersion" among other things. *Liberty Lincoln Mercury, Inc. v. Ford Marketing Corp.*, 149 F.R.D. 65, 74 (D.N.J. 1993).

The speculative nature of Freeman's estimates further demonstrates that the district court did not abuse its discretion when it found that the class was not sufficiently numerous to merit certification. In his argument regarding numerosity, Freeman relied on Norfolk Southern's statement that the 1.3-mile mandatory evacuation radius covered 963 households and that the 3-mile voluntary evacuation radius covered

an additional 6,047 households. Of these, 827 of the households in the mandatory evacuation zone and 1,037 in the voluntary evacuation zone were compensated by Norfolk Southern's voluntary efforts. Freeman offered what he believed to be a reasonable estimate of three people per household in order to conclude that as many as 15,000 people had yet to be compensated.

This court has consistently held that "[t]here is no strict numerical test for determining impracticability of joinder." *In re American Medical Systems*, 75 F.3d at 1079. The court has also said that "[w]hen class size reaches substantial proportions . . . the impracticability requirement is usually satisfied by the numbers alone." *Id.* Nonetheless, "impracticability of joinder must be positively shown, and cannot be speculative." *Golden v. City of Columbus*, 404 F.3d 950, 966 (6th Cir. 2005). Several facts of this case weigh against relying solely on the seemingly large number of potential class members: first, Freeman's numbers necessarily encompass a larger group than he claims to represent, and second, Freeman has not produced concrete evidence of numerosity despite having had ample opportunity to do so.

Although he states a large number based on every household potentially affected by the derailment, Freeman does not purport to represent every person living within the three-mile radius. The class definition advanced by Freeman throughout this case has been a moving target. Whether we look to the definition advanced in Freeman's most recent motion to certify or the definition considered by the magistrate, the result is the same. Both definitions make clear that Freeman attempts to represent a sub-class of residents of the

three-mile radius who experienced some appreciable damage from the derailment. As the magistrate observed, Freeman has not made any effort to show that the residents he includes in his numbers suffered actual damage. With regard to his most recent definition, which includes all persons evacuated from the surrounding area, Freeman does not say how many of the 15,000 supposedly uncompensated residents actually evacuated. Those who did not evacuate must be excluded from the class and therefore from Freeman's estimated numbers. With regard to the definition considered by the magistrate, which includes evacuees and non-evacuees who were harmed in various ways, Freeman's class does not include those residents of the three-mile radius who suffered little to no damage. The omitted group might include those who were out of town during the evacuation, those in the voluntary zone who chose not to evacuate and whose daily routines were little disturbed, and those who were able to relocate temporarily to other quarters with little inconvenience or expense.

The Fifth Circuit offers helpful analysis of a situation where a would-be class representative states a large number, but that number includes individuals within the proposed class mixed together indiscriminately with others not within the proposed class. *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030 (5th Cir. 1981). *Zeidman* involved a suit by investors who alleged that several companies issued false information in order to depress the value of certain securities during a pending tender offer. *Id.* at 1033. In order to establish numerosity, the plaintiffs asserted that nearly six million shares were sold during the relevant dates. *Id.* at 1034. The Fifth Circuit noted the reasonableness of

the plaintiffs' assumption that "any class composed of the sellers of a nationally traded security during a period in which hundreds of thousands or even millions of shares of the security were traded must necessarily be so numerous that joinder of all members is impracticable," and the court commented that such numbers normally would establish numerosity. *Id.* at 1039 (internal quotation marks omitted). Yet that court found the class size in that case to be speculative. First, the court noted that certain categories of investors were excluded from the class, meaning the plaintiffs' aggregate numbers necessarily referred to a group that was larger than the group they purported to represent. *Id.* at 1040. Second, the court noted that the trial court gave the plaintiffs a chance to submit additional evidence prior to rendering a final decision. *Id.* Given these facts, the appellate court determined that the trial court had not abused its discretion by refusing to certify a class.

The plaintiff in the instant case cites large numbers, but his numbers include not just the members of his proposed class but every resident of the three-mile radius. Without "some evidence of the size either of the excluded group or of the remaining class," *id.*, Freeman's evidence of numerosity remains speculative. Furthermore, Freeman had ample opportunity during the course of this protracted litigation to supply concrete evidence of numerosity if there were any such evidence to be had. The magistrate's recommendation and report alerted Freeman to his evidence problem more than six weeks before the district court issued its order. More than a year passed before Freeman again renewed his motion to certify. Given the close geographical proximity of supposedly thousands of

class members, the task of gathering concrete evidence of numerosity should not have been difficult. Yet Freeman did not submit evidence to the district court of even one additional person who wished to seek a legal remedy against Norfolk Southern. Therefore the district court did not abuse its discretion when it found that the evidence of numerosity was too speculative to merit certification.

III.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

No. 3:03-CV-341

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

CYNTHIA TURNAGE, et al.,
Plaintiffs,

v.

NORFOLK SOUTHERN CORPORATION, et al.,
Defendants.

September 28, 2005, Filed

JUDGES: H. Bruce Guyton, United States Magistrate Judge.

REPORT AND RECOMMENDATION

This matter is before the undersigned pursuant to 28 U.S.C. § 636(b), the Rules of this Court, and by Order [Doc. 80] of the Honorable Thomas W. Phillips, United States District Judge, for disposition of Plaintiffs' Renewed Motion for Class Certification [Doc. 75]. [1] For the reasons that follow, it is RECOMMENDED that Plaintiffs' Renewed Motion for Class Certification be **DENIED.**

I. FACTS AND PROCEDURAL HISTORY

This is an action for nuisance arising from a train derailment that occurred on September 15, 2002 in west Knox County, Tennessee. Immediately following the derailment, one of the derailed cars began leaking sulphuric acid, creating a large cloud of dilute water

and sulphuric acid mist over the derailment site. Residents within the 1.3 miles of the derailment site were ordered to evacuate, and it was suggested that residents within three miles of the derailment site evacuate as well. Defendants dispatched emergency hazardous material cleanup crews to the accident site, who used soda ash and lime to neutralize the leaking sulphuric acid. The mandatory evacuation lasted between 24 and 72 hours, as various communities or subdivisions were deemed safe for return and residents were allowed reentry at different times. The defendants set up several claim centers and invited the public to make claims for reimbursement of expenses for lodging, food, clothing, and other evacuation-related problems.

The plaintiff Cynthia Turnage filed a class action complaint on June 3, 2003 in the Circuit Court for Blount County, seeking damages

> on behalf of a class of all persons and business entities who suffered economic losses as a result of a train derailment on September 15, 2002 in West Knox County, Tennessee, and/or who endorsed "reimbursement checks" disbursed by the Defendants with printed matter on the reverse side of the checks which provided for the release of claims.

[Class Action Complaint]. The plaintiff sought "redress for the nuisance" created by the defendants in the form of compensatory damages, including damages for economic losses associated with the putative class members' substantial inconvience and/or evacuation, including lost rental value; punitive damages;

injunctive, declaratory, and other equitable relief; and prejudgment interest, [*Id.* P 1]. The defendants removed the matter to this Court on June 26, 2003. [Doc. 1].

The First Amended Class Action Complaint [Doc. 6], filed August 21, 2003, and which added Bret Freeman as a plaintiff, seeks damages on behalf of a proposed class consisting of:

> (A) all persons who were evacuated by order of law enforcement as a result of the derailment and toxic spill and who suffered economic losses related to the evacuation during the relevant period; and
>
> (B) all persons who were not among the persons evacuated by order of law enforcement as a result of the derailment and toxic spill, but who nevertheless suffered economic losses related to the derailment and toxic spill during the relevant period.

[Doc. 6]. [2] The plaintiffs subsequently filed a motion for class certification. [Doc. 7].

The defendants moved to dismiss the plaintiffs' allegations with respect to non-evacuees [Doc. 24], arguing that the plaintiffs had no standing to represent these members of the proposed class. The plaintiffs subsequently filed a Second Amended Complaint [Doc. 42], deleting the cause of action for damages on behalf of persons who were not mandatorily evacuated as a result of the train derailment and toxic spill, thereby rendering the defendants' motion to dismiss non-evacuee allegations moot. [Doc. 37, 38]. In an amended

motion for class certification [Doc. 36], the plaintiffs requested certification of the following class:

> All persons who were evacuated by order of law enforcement as a result of the derailment and toxic spill and who suffered economic losses related to the evacuation during the relevant period.
>
> Specifically excluded from this definition are all persons who suffered personal injuries of any form, as well as the Defendants, their officers, employees, agents, and other representatives.

[Doc. 36]. The Court denied the plaintiffs' motion for class certification without prejudice on June 17, 2004, finding the motion to be premature. [Doc. 55].

The plaintiffs moved to strike the defendants' fourteenth defense related to the payment of claims and further moved to deny any claim for set-off or release for voluntary payments made to some of the evacuees. [Doc. 51]. The Court denied the motion on March 4, 2005. [Doc. 68]. The Court later clarified its Order, stating as follows:

> The court does not find that individuals who received and endorsed "reimbursement checks" are necessarily excluded from the proposed class. As noted by Norfolk Southern, obtaining such checks did "not preclude submission of personal injury or unforeseen property damage claims in the future." However, Norfolk Southern is entitled to a set-off toward any award for damages for which an individual has already been reimbursed. Accordingly, Norfolk

> Southern is only potentially liable for NEW damage and injury claims.

[Doc. 71].

Plaintiffs Cynthia Turnage and Bret Freeman subsequently filed the present motion, renewing their request to certify a class action for compensatory and punitive damages on behalf of themselves and all persons who suffered economic losses as a result of the derailment. [Doc. 75]. Specifically, the plaintiffs seek certification of the following class ("Proposed Class"):

> All persons who were evacuated by order of law enforcement as a result of the derailment and toxic spill and who suffered economic losses related to the evacuation during the relevant period. Specifically excluded from this definition are all persons who suffered personal injuries in any form, as well as the Defendants, their officers, employees, agents and other representatives.

[Doc. 75]. While the plaintiffs state that they do not yet know the exact size of the proposed class, they indicate in their motion that they "believe that at least approximately 3,000 citizens in West Knox County alone were evacuated due to the derailment and the resulting leak and forming of a cloud of sulfuric acid." [Doc. 75].

In addition to filing the renewed motion for class certification, the plaintiffs also filed two discovery motions, one motion to determine the sufficiency of the defendants' responses to requests for admission [Doc. 73] and a motion to compel more complete responses to

interrogatories. [Doc. 84]. Specifically, the plaintiffs moved the Court to order the defendants to identify each person who received and endorsed a reimbursement check as a result of the derailment; the amount of each check; and the requirements and conditions precedent for receiving such compensation. [Doc. 84].

The undersigned conducted a hearing on the motion to certify and the related discovery issues on June 8, 2005. Following the hearing, the parties requested that the Court reserve ruling on the motions pending the parties' attempt to mediate this matter on July 15, 2005. In a letter filed on June 15, 2005 as a supplement to the hearing [Doc. 95], the plaintiffs sought to clarify the plaintiffs' position on the recovery of inconvenience damages and proposed the following class definition, based upon the allegations in the plaintiffs' First Amended Complaint:

> All persons, including those evacuated by Order of law enforcement and those who were not, who suffered all available nuisance damages, including economic losses and inconvenience, related to the evacuation.

[Doc. 95]. The plaintiffs note in the letter that the proposed class definition includes both evacuees and non-evacuees and is "not limited to any specific geographic area." The plaintiffs further state in the letter that the plaintiffs "are in the process of obtaining affidavits to satisfy the Court [that] the proposed Class is represented," and they request that the Court either temporarily stay a decision of the class certification motion until this evidence is presented or provisionally

certify the class and set another hearing "to make certain all formalities have been met." [*Id*].

The parties' attempt at mediation on July 15, 2005 was unsuccessful, and on July 22, 2005, the undersigned entered an Order granting in part the plaintiffs' discovery motions and ordering the defendants, among other things, to produce a list or compilation of the names of those who received reimbursement checks; the amounts of those checks; and any information relevant to the requirements or conditions precedent for receiving such compensation. [Doc. 99]. The defendants were ordered to produce this information within thirty days of the entry of the Order. [3]

The defendants submitted a letter [Doc. 100] to the Court on August 8, 2005, opposing any consideration of the plaintiffs' June 15, 2005 letter [Doc. 95] because it did "not add any information that would clarify the issue of certification." The defendants argue that the plaintiffs' letter inexplicably relies upon the First Amended Complaint, which had not been a basis for litigation since January 28, 2005 when the plaintiffs filed their Second Amended Complaint. Further, the defendants point out, the plaintiffs had previously withdrawn their request to certify a class including non-evacuees, and therefore, any request to certify a class including non-evacuees was improper. [*Id.*].

On September 14, 2005, the Court permitted the plaintiffs to file a Third Amended Complaint [Doc. 104], in which the Proposed Class is more particularly described as follows:

> All persons who evacuated their real property and/or "sheltered in place," [4] and/or were

prevented from returning to their homes as a result of, and within a three mile radius from, the derailment and toxic spill.

[Third Amended Complaint P 15]. The Third Amended Complaint seeks compensatory and punitive damages for the defendants' nuisance. [*Id.* PP 24, 28].

II. POSITIONS OF THE PARTIES

A. Plaintiffs' Argument

The plaintiffs argue that they meet the initial prerequisites for class certification as set forth in Rule 23(a)(1)-(4) of the Federal Rules of Civil Procedure. They submit that there are numerous questions of law and fact that are common to all members of the proposed class and which predominate over any questions affecting only individual members of the proposed class, including:

> a. Whether Norfolk Southern operated or managed the train carrying sulfuric acid;
>
> b. Whether the train operated or managed by Norfolk Southern carrying sulfuric acid derailed on September 15, 2002;
>
> c. Whether sulfuric acid leaked or spilled from the train which derailed on September 15, 2002;
>
> d. Whether the leak or rip of the tank car holding approximately 10,600 gallons of sulfuric acid produced a danger or threat;
>
> e. Whether an evacuation or shelter-in-place order was given by law enforcement agencies for parts of Knox County and Blount County;

> f. Whether law enforcement agencies ordered citizens, including Plaintiffs and members of the proposed class, to leave their homes and/or businesses and barred them from returning for a period of time;
>
> g. Whether Plaintiffs and the proposed class were injured or damaged as a result of the derailment and/or sulfuric acid;
>
> h. Whether Norfolk Southern's course of conduct, actions and inactions constitute a nuisance which unlawfully interfered with the rights of Plaintiffs and the members of the proposed class;
>
> i. Whether compensatory damages are owed to Plaintiffs and members of the proposed class; and
>
> j. Whether Plaintiffs and the proposed class are entitled to punitive damages, and if so, in what amount.

The plaintiffs, as proposed class representatives, argue that their claims are typical of all members of the proposed class's claims because they arise from Norfolk Southern's common course of wrongful conduct and that the harm caused to the plaintiffs is "identical to the harm caused to all members of the proposed class." The plaintiffs further assert that they will fairly and adequately represent and protect the interests of the members of the proposed class. [Doc. 75]. In support of their motion for class certification, the plaintiffs have each submitted an affidavit.

1. *Turnage Affidavit*

Cynthia Turnage is a citizen and resident of Blount County, Tennessee. On the date of the derailment, Turnage was in Dickson, Tennessee. She learned by watching television that the derailment had occurred and that some residents were being mandatorily evacuated. She then confirmed with friends that her home was in the mandatory evacuation area. Because Turnage had her pet with her, she did not feel she could find a hotel which accommodated pets. Therefore, she stayed in Dickson with a friend. Because she did not have appropriate personal items with her, she missed work on Monday, September 16 and Tuesday, September 17, 2002. Turnage states that during the evacuation, "life was not normal and was filled with anxiety and uncertainty." She was barred from entering her home or community, and she states that she "know[s] that many others in this community were forced to evacuate because of this derailment and toxic spill and believe[s] that they incurred additional expenses." Moreover, Turnage is concerned about other possible short term or long-term effects on her friends, their homes, property, and community. [Doc. 34, Corrected Affidavit of Cynthia Turnage].

2. *Freeman Affidavit*

Bret Freeman resides in the Mallard Bay subdivision in West Knox County, Tennessee, with his wife and daughter. Freeman and his family were home at the time of the derailment on September 15, 2002. Freeman and his wife saw the white cloud and went outside. Freeman's wife's lungs started burning, as if she were breathing ammonia. Freeman and his family immediately left. Law enforcement officials instructed all the other residents in Freeman's subdivision to

evacuate immediately. Due to the evacuation, Freeman had to arrange other lodging for his family. They drove to the home of his wife's parents in Oak Ridge, where they stayed until they returned home on Wednesday. Freeman could not enter his home or community during the evacuation, and because he and his wife did not have any time to pack any clothes or other belongings, neither had suitable work clothes and thus missed work on Monday, Tuesday, and Wednesday, September 18-20, 2003. Additionally, Freeman states that he spent two more days away from work cleaning up property that remained outside and was potentially exposed to the sulphuric acid. Freeman states that he knows of "many others" in his community that were forced to evacuate and incurred additional expenses, and he also testifies that he is concerned about the possible effects on his family, friends, home, and property. [Doc. 35, Affidavit of Bret Freeman].

Additionally, the plaintiffs rely upon the following figures provided by defense counsel in a letter dated July 8, 2005, to establish the numerosity of the class:

> 1. There are 963 households located in the 1.3 mile radius, of which 827 households received payments totaling $ 343,353.19; and
>
> 2. There are 7,010 households in the 3.0 mile radius (including the 963 households in the 1.3 mile radius), of which a total of 1,864 households received payments totaling $ 694,185.89.

[Doc. 105 Ex. 2]. In a letter to the Court dated July 14, 2005, the plaintiffs state that they "believe that 3 people to a household is a fair number" and therefore, "21,030 people were within the three mile zone," leaving 5,146

households and approximately 15,400 people who, in the plaintiffs' estimation, have not been compensated within the three mile area. [Doc. 105 Ex. 3].

B. Defendants' Argument

The defendants argue that the plaintiffs' motion for class certification should be denied because: (1) the plaintiffs have failed to show that there are any potential members remaining in the proposed class and (2) the plaintiffs cannot demonstrate that they have claims typical of the claims of the proposed class members. [Doc. 81].

III. ANALYSIS

As an initial matter, the Court must determine the parameters of the class proposed by the plaintiffs. The Renewed Motion for Class Certification [Doc. 75] seeks to certify a class consisting of all persons who were evacuated by law enforcement as a result of the derailment and toxic spill and who suffered economic losses as a result of the evacuation. This proposed class definition specifically excluded personal injuries "in any form." The defendants argue that the exclusion of personal injury claims from the claims of the proposed class precludes recovery of damages for inconvenience, discomfort, and annoyance experienced as a result of the evacuation. The plaintiffs argue, on the other hand, that such damages are "economic losses" recoverable under a theory of nuisance and do not constitute damages for personal injury. Furthermore, at the hearing, the undersigned questioned the plaintiffs extensively about the limitation of the proposed class to only those who were evacuated, when Cynthia Turnage, one of the proposed class representatives, was

not in fact evacuated from her residence because she was not at home at the time of the derailment. Presumably in response to these arguments, the plaintiffs sought to "clarify" the proposed class definition in their letter of June 15, 2005. [Doc. 95]. The plaintiffs' letter, however, did little to clarify matters, as it referenced the allegations set forth in the First Amended Complaint, which had already been superseded by another amended complaint. Moreover, the plaintiffs' letter proposed a class consisting of evacuees and non-evacuees, even though the plaintiffs had voluntarily dismissed all non-evacuee allegations with the filing of the Second Amended Complaint. Further, the letter states that the plaintiffs were in the process of obtaining additional affidavits to satisfy the Court that the class is adequately represented. However, in the three months since the filing of the plaintiffs' letter, no such affidavits have been forthcoming.

The plaintiffs' proposed class definition shifted again with the filing of the Third Amended Complaint, which references a proposed class consisting of all persons who evacuated, sheltered in place or were prevented from returning to their homes as a result of, and within a three mile radius of, the derailment and toxic spill.

Based upon the plaintiffs' filings and, particularly, the Third Amended Complaint, the Court will consider, for the purposes of this motion, that the plaintiffs are seeking certification of a proposed class consisting of the following:

> All persons (1) who evacuated their real property and/or "sheltered in place," and/or were

> prevented from returning to their homes and (2) who suffered all available nuisance damages, including economic losses and inconvenience, as a result of, and within a three mile radius from, the derailment and toxic spill.

Having determined the parameters of the proposed class for the purposes of this motion, the Court will now turn to the issue of whether the proposed class may be certified. In order to obtain class certification, the plaintiffs must establish each of the following threshold requirements: (1) that the class is so numerous that joinder of all members is impracticable; (2) that there are questions of law or fact common to the class; (3) that the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) that the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a). These four requirements are commonly referred to as the requirements of numerosity, commonality, typicality, and adequacy of representation. *See Coleman v. GMAC*, 296 F.3d 443, 446 (6th Cir. 2002). [5]

A. Numerosity

The first requirement under Rule 23(a) is that "the class is so numerous that joinder of all members is impracticable . . . ." Fed. R. Civ. P. 23(a)(1). "There is no strict numerical test for determining impracticability of joinder." *In re American Medical Sys.*, 75 F.3d 1069, 1079 (6th Cir. 1996). However, while "the exact number of class members need not be pleaded or proved, impracticability of joinder must be positively shown, and cannot be speculative." *McGee v. East Ohio Gas*

Co., 200 F.R.D. 382, 389 (S.D. Ohio 2001) (quotation marks and citations omitted). The party seeking class certification bears the burden of proving impracticability, and "mere speculation as to the number of parties involved is not sufficient to satisfy Rule 23(a)(1)." 7A Charles Alan Wright, Arthur R. Miller, and Mary K. Cane, *Federal Practice and Procedure* § 1762 (3d ed. 2001). Finally, the Court must engage in a "rigorous analysis" when evaluating the plaintiff's proof of numerosity. *See General Tel. Co. v. Falcon*, 457 U.S. 147, 161, 102 S.Ct. 2364, 72 L. Ed. 2d 740 (1982).

To establish numerosity, the plaintiffs rely upon the figures provided by the defendants [Doc. 105 Ex. 2], which indicate that there are 7,010 households within three miles of the derailment site. The plaintiffs state that they "believe" three people to a household to be "a fair number" and that there are therefore 21,030 potential class members in the three-mile zone. The figures provided by the defendants also indicate that approximately 1,864 households within the three-mile area have already received compensation from Norfolk Southern. Of the 963 households within the 1.3-mile mandatory evacuation area, 827 households have already received compensation. The plaintiffs argue that the compensated residents should remain part of the class, as Norfolk Southern may still be potentially liable for new damage and injury claims for these individuals.

The Sixth Circuit recently addressed the issue of numerosity in *Golden v. City of Columbus*, 404 F.3d 950 (6th Cir. 2005). In *Golden*, the putative class of plaintiffs consisted of Columbus tenants whose water service was or was going to be terminated because of a prior

tenant's or the landlord's indebtedness. *Id.* at 966. To establish impracticability of joinder, the plaintiff Golden relied upon the number of renters in Columbus (150,000). *Id.* While the Court noted that it had no reason to dispute this figure, it found merely referring to this number was not sufficient to establish numerosity under Rule 23(a)(1):

> Golden must offer something more than bare speculation to link the gravamen of her claim for liability to the class of individuals she purports to represent. The gravamen of Golden's equal protection claim is that the City irrationally terminates certain tenants' water service. Golden does not allege that *all* tenants in Columbus are at risk of constitutional harm, only those whose predecessors or landlords are indebted to the City. Thus, reference to the total number of tenants in Columbus is not probative of the number of tenants reasonably likely to face the harm for which Golden seeks redress. Of course, the total number of tenants in Columbus is probative in the very limited sense that it represents the absolute maximum number of plaintiffs that could be in any class action brought by a tenant against the City. But the district court must engage in a "rigorous analysis" when evaluating the plaintiff's proof of numerosity.

Golden, 404 F.3d at 966. Accordingly, the Court affirmed the district court's denial of the motion for class certification. *Id.*

While the plaintiffs in the present case have established the maximum number of households within the three-mile area, they have produced little more than sheer speculation to show that residents in that area, other than the named plaintiffs, have in fact suffered damages as a result of the derailment. Furthermore, there is no evidence before the Court to suggest that those residents who have already received compensation from Norfolk Southern (and who presumably suffered damages) have not been fully compensated for their injuries. Thus, the undersigned finds that the proof relied upon by the plaintiff, without more, is too speculative to satisfy the numerosity requirement. *See Golden*, 404 F.3d at 966. Finally, the undersigned is of the opinion that because the potential class members are in such a limited geographical area, joinder of any potential plaintiffs in the future would be relatively easy. *See Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 131-32 (1st Cir. 1985) ("Joinder is considered more practicable when all members of the class are from the same geographical area."); *McGee*, 200 F.R.D. at 388.

For these reasons, the undersigned finds that the first requirement of Rule 23(a)(1) has not been satisfied.

B. Commonality

The second requirement of Rule 23(a) is that there must be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Although Rule 23(a)(2) is couched in terms of "questions," there need be only one question common to the class to satisfy this requirement. *See Sprague v. General Motors Corp.*, 133 F.3d 388, 397 (6th Cir. 1998).

The defendants do not argue that the plaintiffs have to establish commonality, and the undersigned finds that the plaintiffs have a made a sufficient showing of common questions of law and fact in this case. Accordingly, this requirement of Rule 23(a)(1) will be deemed satisfied.

C. Typicality

The third requirement of Rule 23(a) is that "the claims or defenses of the representative parties are typical of the claims or defenses of the class . . . ." Fed. R. Civ. P. 23(a)(3). "The premise of the typicality requirement is simply stated: as goes the claim of the named plaintiff, so goes the claims of the class." *Sprague*, 133 F.3d at 399.

Plaintiff Freeman was evacuated and prevented from returning home for several days as a result of the derailment. While Plaintiff Turnage's residence was in the mandatory evacuation area, she was not subject to mandatory evacuation because she was not at home at the time of the derailment. However, she also claims that she was prevented from returning home for several days. Neither proposed class representative, however, "sheltered in place" or was located in the "suggested" evacuation zone. Accordingly, it does not appear that Freeman's and Turnage's claims are typical of the claims of all of the members of the proposed class.

D. Adequacy of Representation

The fourth requirement of Rule 23(a) is that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). To determine adequacy of representation, the

proposed class representatives must show that (1) they have a common interest with members of the proposed class, and (2) they "will vigorously prosecute the interests of the class through qualified counsel." *Senter v. General Motors Corp.*, 532 F.2d 511, 525 (6th Cir. 1976). "The adequate representation requirement overlaps with the typicality requirement because "in the absence of typical claims, the class representative has no incentives to pursue the claims of the other class members." *In re Am. Med. Sys.*, 75 F.3d at 1083.

In this case, the Court has concluded that the named plaintiffs' claims are not typical of the claims of the proposed class members. For the same reasons, the Court concludes that the named plaintiffs would not be adequate class representatives as well. The undersigned would note for the record that there is no doubt that plaintiffs' counsel is more than qualified to manage the proposed class action; however, competent counsel alone is not sufficient to satisfy the requirement of adequacy of representation.

IV. CONCLUSION

For the foregoing reasons, the undersigned concludes that the requirements of Fed. R. Civ. P. 23(a)(1) have not been satisfied in this case. Accordingly, it is hereby **RECOMMENDED** [6] that the Plaintiffs' Renewed Motion for Class Certification [Doc. 75] be **DENIED.**

Respectfully Submitted,

s/ H. Bruce Guyton

United States Magistrate Judge

Footnotes

1 The Court conducted a hearing on this motion on June 8, 2005. Following the hearing, the parties requested that the Court reserve ruling on this motion pending the parties' attempt to mediate this matter on July 15, 2005. The parties' mediation attempt was apparently unsuccessful.

2 The First Amended Complaint also added Donn Stelzer as a plaintiff; however, Stelzer subsequently died, and his name was removed from the style of this action. [Doc. 40].

3 The defendants provided this information to the plaintiffs as ordered on August 8, 2005. [Doc. 105 Ex. 2].

4 Although this phrase is not particularly defined in the Third Amended Complaint, the plaintiffs' letter of June 15, 2005 [Doc. 95] states that "shelter in place" means "that if people chose not to leave their homes, then they were to stay there and not come and go, while also turning off their air conditioning and closing all doors and windows."

5 Even if the plaintiffs satisfy the four requirements for class certification pursuant to Rule 23(a), the plaintiffs must further demonstrate that they satisfy one of the three types of class actions set forth in Fed. R. Civ. P. 23(b). Because the undersigned finds that the plaintiffs have failed to satisfy the threshold requirements of Rule 23(a), it is unnecessary to analyze whether the plaintiffs have satisfied the requirements of Rule 23(b).

6 Any objections to this Report and Recommendation must be served and filed within ten (10) days after service of a copy of this recommended disposition on

the objecting party. Such objections must conform to the requirements of Rule 72(b), Federal Rules of Civil Procedure. Failure to file objections within the time specified waives the right to appeal the District Court's order. *Thomas v. Arn*, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985). The district court need not provide *de novo* review where objections to this report and recommendation are frivolous, conclusive or general. *Mira v. Marshall*, 806 F.2d 636 (6th Cir. 1986). Only specific objections are reserved for appellate review. *Smith v. Detroit Federation of Teachers*, 829 F.2d 1370 (6th Cir. 1987).

No. 3:03-CV-341

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

CYNTHIA TURNAGE, et al.,
Plaintiffs,

v.

NORFOLK SOUTHERN CORPORATION, et al.,
Defendants.

November 15, 2005, Filed

JUDGES: Thomas W. Phillips, UNITED STATES DISTRICT JUDGE.

ORDER

This matter is before the court on the report and recommendation filed by United States Magistrate Judge H. Bruce Guyton [ECF # 111]. Plaintiffs have filed objections [ECF # 112], to which defendants have responded [ECF # 113]. Plaintiffs have also replied to defendants' responses [ECF # 115].

After a careful review of this matter, the court is in complete agreement with the magistrate judge's recommendation that the purported class not be certified. Indeed, in the view of the undersigned, the speculative proof relied upon by the plaintiffs does not satisfy the requirements of Fed. R. Civ. P. 23(a)(1). The court therefore ACCEPTS IN WHOLE the report and recommendation under 28 U.S.C. § 636(b)(1) and Fed.

R. Civ. P. 72(b). It is ORDERED, for the reasons stated in the report and recommendation, which the court adopts and incorporates into its ruling, that the plaintiffs' renewed motion for class certification [ECF # 75] be DENIED. Any currently pending motions are DENIED AS MOOT.

IT IS SO ORDERED.
ENTER:

s/Thomas W. Phillips

UNITED STATES DISTRICT JUDGE

No. 3:03-CV-341

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
TENNESSEE

CYNTHIA TURNAGE, et al.,
Plaintiffs,

v.

NORFOLK SOUTHERN CORPORATION, et
al.,
Defendants.

April 28, 2006, Filed

ORDER

The plaintiffs petition for leave to appeal an interlocutory order of the district court denying their motion for class certification in this diversity action for nuisance damages arising from a train derailment and chemical spill. The defendants oppose the petition, both on the merits and on the ground that it was not timely.

The issue of whether the petition was timely need not considered in view of our determination that leave to appeal should not be granted at this time. The Committee Note accompanying Fed. R. Civ. P. 23(f) states that "[p]ermission to appeal may be granted or denied on the basis of any consideration that the court of appeals finds persuasive." However, "many suits with class-action allegations present familiar and almost routine issues that are no more worthy of immediate

appeal than many other interlocutory rulings." *Id.* "The district court's decision to deny class certification is reviewed for abuse of discretion." *Ball v. Union Carbide Corp.*, 385 F.3d 713, 727 (6th Cir. 2004). "This deferential standard of review supports the notion that Rule 23(f) appeals will be the exception, not the norm." *In re Delta Air Lines*, 310 F.3d 953, 960 (6th Cir. 2002). The relevant factors weigh against an interlocutory appeal in this case.

The plaintiffs' petition for leave to appeal is DENIED without prejudice to the plaintiffs producing additional evidence in support of a renewed motion for class certification that addresses the district court's concerns regarding the typicality requirement. See Fed. R. Civ. P. 23(c)(1)(C) (An order determining whether to certify a class action "may be altered or amended before final judgment.").

ENTERED BY ORDER OF THE COURT

No. 3:03-CV-341

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

CYNTHIA TURNAGE, et al.,
Plaintiffs,

v.

NORFOLK SOUTHERN CORPORATION, et al.,
Defendants.

July 25, 2007, Filed

JUDGES: Thomas W. Phillips, United States District Judge.

FINDINGS OF FACT AND CONCLUSION OF LAW

A bench trial was held on plaintiff's claim for private nuisance. Following the trial, the parties filed proposed findings of fact and conclusions of law. Having heard the testimony of the parties, having reviewed the exhibits introduced into evidence, and having considered the parties' proposed findings and conclusions, the following are the Court's findings of fact and conclusions of law:

Findings of Fact

For purposes of this action only, defendants admit that a derailment took place; that a single tank car containing Oleum, or sulfuric acid, ruptured; and that as a result of that incident, the plaintiff was evacuated

from his home. The only issue litigated in this matter is what, if any, damages the plaintiff incurred under a theory of private nuisance.

On September 15, 2002, at approximately 11:20 a.m., Norfolk Southern Company ("Norfolk Southern") train (number 15T) derailed in Knox County, Tennessee, causing a tanker filled with Oleum to rupture and spew fuming Oleum into the air above portions of Blount and Knox County, Tennessee. Emergency management agency personnel from Knox County responded and implemented a mandatory evacuation of residents living within a 1.3 mile radius of the derailment site and an optional, or voluntary, evacuation of residents living within a 3 mile radius of the derailment site. The isolation areas were maintained to prevent exposure to the public until it was determined that it was safe for residents to re-enter the area. The 1.3 mile mandatory evacuation distance and the 3 mile voluntary evacuation distance applied from the beginning of the incident on Sunday, September 15, 2002, until 9:00 p.m. on Monday, September 16, 2002, when the evacuation was lifted for nine subdivisions, reducing the evacuation distance down to less than one mile radius from the derailment site. At 7:00 a.m. on Tuesday, September 17, 2002, the evacuation was lifted in its entirety, and all residents were allowed to return to their homes. The status of the evacuation was communicated to the public by radio, television, print media, an information telephone line for questions, and the Norfolk Southern Hotline.

Plaintiff Bret Freeman ("Freeman") lived approximately 1.1 miles from the derailment site in the Mallard Bay subdivision. On the 15th of September, Freeman, his wife, and his step-daughter, evacuated

their home immediately following the derailment and drove to the home of Freeman's in-laws, which was approximately 30 minutes away. The plaintiff took only the family's pets, four dogs and three cats, leaving behind food, clothing, and personal hygiene items. Freeman and his family remained at his in-laws' home until Wednesday, September 18, 2002. There is no evidence in the record that plaintiff either read about, heard about, or was otherwise made aware of the fact that the mandatory evacuation had been reduced in size or was lifted until Wednesday morning. It was at that time that plaintiff and his family returned home.

As a result of the derailment, plaintiff was unable to work Sunday through Wednesday; suffered appreciable and substantial inconvenience; and incurred out-of-pocket expenses for food, personal items, and the cost of water related to plaintiff having to partially drain and refill his swimming pool. Plaintiff states that, after he returned home, he washed both his and his neighbors' boats and jet skis, as well as pressure washed the outside of his home. Plaintiff estimates that his out-of-pocket expenses, with respect to the swimming pool water, food, and personal items, total $ 400.00. As to lost wages, plaintiff states in his findings of fact that he normally works "11 hours a day in a 55 hour work week, . . . [and] that a conservative estimate of his annual income was $ 103,800.00, or $ 50.00 per hour." [1] In plaintiff's estimation, he calculates that he was deprived of, and should be awarded, "$ 3,600.00 for losing 72 hours worth of work." Lastly, the plaintiff estimates that a fair and appropriate sum to compensate him for his inconvenience is "$ 1,000.00 per day for each day he was away from home (Sunday, Monday, and Tuesday), for a total of $ 3,000.00." In sum,

plaintiff proposes a damages calculation of $ 7,000.00 as result of the derailment.

The defendants counter plaintiff's damage assessment. The defendants state that the plaintiff failed to take advantage of readily available assistance provided by Norfolk Southern, which included home testing and clean-up; that the plaintiff did not return to his residence and to work immediately after the evacuation was reduced and/or lifted; that plaintiff's lost wages claim of 72 hours reaches beyond the time plaintiff was away from home; that plaintiff was paid his base salary during the time he claims he did not work; that plaintiff admits that he could have made up for lost bonuses; and that plaintiff has not provided any receipts or other documentation to support his claim of damages.

Conclusions of Law

A private nuisance under Tennessee law is defined as "'anything which annoys or disturbs the free use of one's property, or which renders its ordinary use of physical occupation uncomfortable . . . [and] extends to everything that endangers life or health, gives offense to the senses, violates the laws of decency, or obstructs the reasonable and comfortable use of property.'" *Lane v. W.J. Curry & Sons*, 92 S.W.3d 355, 364 (Tenn. 2002) (quoting *Pate v. City of Martin*, 614 S.W.2d 46, 47 (Tenn. 1981)). The development of nuisance law dates back to the twelfth century in England and has evolved to encompass physical conditions to the land, such as vibrations, pollution, or flooding; conditions on adjoining property that impair the occupant's tranquility, such as conducting an unlawful business or keeping diseased animals; and causing discomfort or

inconvenience to the occupants of the property, such as odor, dust, smoke, or noise. *Lane*, 92 S.W.3d at 365 (citations omitted).

Several type of damages are available to compensate an occupant who has been subjected to private nuisance. "[I]n cases involving a temporary private nuisance, which is one that can be corrected, damages may be awarded for the cost of restoring the property to its pre-nuisance condition, as well as damages for inconvenience, emotional distress, and injury to the use and enjoyment of the property." Id. (citing *Pryor v. Willoughby*, 36 S.W.3d 829, 831 (Tenn.Ct.App. 2000); *Fink v. Crean*, No. M2005-01364-COA-R3-CV, 2006 Tenn. App. LEXIS 814, 2006 WL 3783541, at *8 (Tenn.Ct.App. Dec. 21, 2006). Such damages are not mutually exclusive. *Pryor*, 36 S.W.3d at 831 (citing *Citizens Real Estate v. Mountain States Development Corporation*, 633 S.W.2d 763, 767 (Tenn.Ct.App.1981)). Also, nuisance does not relate to a defendant's conduct, but a type of harm suffered by a plaintiff. See *Zollinger v. Carter*, 837 S.W.2d 613, 615 (Tenn.Ct.App. 1992).

The defendants argue that plaintiff cannot allege inconvenience damages because plaintiff has not specifically alleged damages for diminution of the value of property or rental value of the property. The defendants cite *Smith v. Maury County*, No. 01-A-01-9804-CH-00207, 1999 Tenn. App. LEXIS 601, 1999 WL 675135 (Tenn.Ct.App. Sept. 1, 1999) in support of their argument. However, in the Smith case, the Court merely held that "damages shall not include an award for discomfort, annoyance, and inconvenience separate and apart from the diminution of rental value." *Smith*, 1999 Tenn. App. LEXIS 601 at *12, 1999 WL 675135 at

*5 (emphasis added). In other words, the Court was concerned with awarding duplicative damages. In fact, a court can award inconvenience damages without the establishment of diminution of rental value. See *Myers v. King*, No. 86-257-II, 1987 Tenn. App. LEXIS 2488, 1987 WL 6549, at *2 (Tenn.Ct.App. Feb. 13, 1987)(awarding discomfort, inconvenience, and incidental damages, despite the fact that the plaintiffs did not offer any proof on the diminution of the rental value of their property).

In the instant situation, it is undisputed that the defendants interfered with the use and enjoyment of plaintiff's property. Defendants, themselves, ordered an evacuation in light of fuming Oleum spreading across Knox and Blount County. Any inconvenience associated with evacuating the property would proceed from the direct injury to the usable value of the premises. This is not a situation where a plaintiff did not present sufficient evidence that a nuisance affected his or her property. Accordingly, inconvenience damages can be properly assessed against the defendants.

Furthermore, a court will assess plaintiff's damages, if any, at such an amount as in a court's judgment and discretion will fairly and adequately compensate the plaintiff for his loss, that is, to make the wronged party whole as nearly as may be done by an award of money. *Overstreet v. Shoney's Inc.*, 4 S.W.3d 694, 703 (Tenn.Ct.App. 1999). Additionally, a party seeking damages has the burden of proving them. Id. While the damages do not have to be mathematically precise or exact, the damages cannot be based on mere conjecture or speculation. Id. However, uncertain or speculative damages are prohibited only when the existence, not

the amount, of damages is uncertain. Id. The evidence required to support a claim for damages need only prove the amount of damages with reasonable certainty. Id. Proof of damages must be as certain as the nature of the case permits and must enable the trier of fact to make a fair and reasonable assessment of the damages. Id.

Additionally, a plaintiff has a duty to mitigate his or her damages, that is, an injured party is charged with a duty to exercise reasonable care and due diligence to avoid loss or minimize damages after suffering injury. *Kline v. Benefiel*, No. W1999-00918-COA-R3-CV, 2001 Tenn. App. LEXIS 14, 2001 WL 25750, at *7 (Tenn.Ct.App. Jan. 9, 2001) (citing *Cook & Nichols, Inc. v. Peat, Marwick, Mitchell & Co.*, 480 S.W.2d 542, 545 (Tenn.Ct.App. 1971); *Gilson v. Gillia*, 45 Tenn. App. 193, 321 S.W.2d 855, 865 (Tenn.Ct.App. 1958)).

In the instant matter, since liability is conceded as to this plaintiff, the Court must make findings with respect to a damage award. Plaintiff claïms his damages as follows: 1) out-of-pocket expenses were approximately $ 400 for food, clothing, toiletries, and water costs to refill the family's swimming pool; 2) a loss of 72 hours of work at a rate of $ 50.00 an hour to total $ 3,600.00; and 3) inconvenience damages valued at $ 1,000.00 for Sunday, Monday, and Tuesday to total $ 3,000.00. The Court finds plaintiff's claim of incidental damages to be reasonable, sufficiently precise, as well as modest, and therefore accepts plaintiff's calculation of $ 400 for food, clothing, toiletries, and swimming pool water.

The Court also finds that, as a result of the incident, the plaintiff indeed lost wages. In light of plaintiff's duty to mitigate his damages, the Court limits plaintiff's lost work to four days, Sunday through Wednesday. Based on plaintiff's testimony in which he referred to his 2001 tax returns where he grossed approximately $ 102,800.00 and estimated that he worked 5 days a week, the Court adopts a daily rate figure of $ 395.00 per day. Given plaintiff's testimony regarding the fluctuation of sales week to week, as well as plaintiff's varying work hours, an average daily rate of plaintiff's wages based on the previous year's annual salary is the best indicator of wages lost, when estimating pay loss for several days. [2] Therefore, plaintiff's lost wages total $ 1,580.00. While it is true that the plaintiff was paid his regular base salary the week of the incident and could have "worked harder" in subsequent weeks to meet sales goals, the plaintiff was still deprived of time designated for work, which is ultimately lost. Additionally, in light of the plaintiff's testimony as to his annual income and available social security records, the Court finds that plaintiff's lost wages are sufficiently established with reasonable certainty.

As to plaintiff's claim for inconvenience damages, the Court is cognizant that, for several days, the plaintiff was forced to provide arrangements for his family and pets, forced to contend with complications directly from a disruption of his life; and unable to perform normal obligations. However, the Court finds that plaintiff's inconvenience injuries do not warrant $ 1,000.00 per day. After careful consideration of the plaintiff's testimony, the Court feels that an amount of $ 500.00 per day for Sunday, Monday, and Tuesday, would adequately compensate the plaintiff for his

inconvenience. In summation, the plaintiff's total damages amount to $ 3,480.00.

Conclusion

The Court hereby finds that the plaintiff is entitled to damages resulting from a nuisance created by defendants. After an examination of the applicable law and record of the case, the Court concludes that the plaintiff shall be awarded monetary damages in the amount of $ 3,480.00.

Accordingly, it is hereby ORDERED AND ADJUDGED as follows:

1. Plaintiff shall be awarded incidental damages, lost wages, and inconvenience damages in the amount of $ 3,480.00, to be paid by defendants.

2. Costs of this action shall be taxed pursuant to E.D. TN. LR 54.1.

IT IS SO ORDERED.

s/ Thomas W. Phillips

United States District Judge

JUDGEMENT ORDER

This case came before the Court on bench trial of plaintiff Bret D. Freeman and defendants, Norfolk Southern Railway Corporation and Norfolk Southern Company. The Honorable Thomas W. Phillips, United States District Judge, having rendered a decision on the issues at trial,

Accordingly, it is hereby ORDERED AND ADJUDGED as follows:

1. Plaintiff shall be awarded incidental damages, lost wages, and inconvenience damages in the amount of $ 3,480.00, to be paid by defendants.

2. Costs of this action shall be taxed pursuant to E.D. TN. LR 54.1.

Dated at Knoxville, Tennessee, this day of July, 2007

Footnotes

1 Plaintiff's actual testimony is that he earned approximately $ 102,800.00 "and something" in 2001 and between $ 80,000.00 and $ 70,000.00 in 2002.

2 While defendants allege that the plaintiff should have returned to his residence by Monday, September 16, at 9:00 p.m. or by Tuesday, September 17, at 7:00 a.m., it is not unreasonable for the plaintiff to have returned Wednesday morning either in light of being unaware of the status of the evacuation or in light of preparing to return to his residence to confront any problems that might await him.

Filed 3/26/2009
No. 07-6033
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CYNTHIA TURNAGE,
Plaintiff,
and
BRET FREEMAN,
Plaintiff-Appellant,
v.
NORFOLK SOUTHERN CORPORATION;
NORFOLK SOUTHERN RAILWAY COMPANY,
Defendants-Appellees.

January 22, 2009, Filed

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE.

BEFORE: SILER, BATCHELDER, and ROGERS, Circuit Judges.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for

rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case.

Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

(2)

No. 09-5

Supreme Court, U.S.
FILED
JUL 31 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

BRET FREEMAN,
Petitioner,

v.

NORFOLK SOUTHERN CORPORATION;
NORFOLK SOUTHERN RAILWAY COMPANY,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Sixth Circuit correctly applied the federal class certification standards when it determined that the district court, after rigorous analysis, correctly exercised its discretion in holding that Petitioner failed to demonstrate impracticability of joinder under Rule 23(a)?

PARTIES TO THE PROCEEDING

Respondent Norfolk Southern Railway Company is a wholly-owned subsidiary of Norfolk Southern Corporation. Norfolk Southern Corporation is a publicly traded corporation. No parent or publicly held corporation owns 10% or more of the stock of Norfolk Southern Corporation.

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IN THE

Supreme Court of the United States

No. 09-5

BRET FREEMAN,

Petitioner,

v.

NORFOLK SOUTHERN CORPORATION;
NORFOLK SOUTHERN RAILWAY COMPANY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

Norfolk Southern Railway Company and Norfolk Southern Corporation ("Respondents") hereby oppose the petition for a writ of certiorari seeking review of an unpublished order of the United States Court of Appeals for the Sixth Circuit. The court of appeals affirmed the Order of the United States District Court for the Eastern District of Tennessee in favor of Respondents on a discretionary ruling with respect to class certification. This case does not warrant certiorari because it involves nothing more than the appropriate exercise of discretion in applying well-established standards under Fed. R. Civ. P. 23 to the specific allegations of the Petitioner in this case.

COUNTERSTATEMENT OF THE CASE

Petitioner omitted certain facts and procedural history germane to the underlying class certification inquiry and relied on by the district court and Sixth Circuit, and Petitioner mischaracterized the reasoning of the Sixth Circuit. Those omissions and mischaracterizations justify a brief counter-statement. Sup. Ct. R. 15(2).

A. Factual Background

This is an action for nuisance arising from a train derailment that occurred on September 15, 2002, in Knox County, Tennessee. Pet. App. 2a. Following the derailment, one of the derailed cars began leaking dilute sulphuric acid. As a precaution, a mandatory evacuation of residents living within a 1.3-mile radius of the derailment site and a voluntary evacuation of residents living within a 3-mile radius of the derailment site were ordered. Pet. App. 2a. Petitioner and his family lived approximately 1.1 miles from the derailment site. Pet. App. 3a.

Following the incident Respondents set up a claims center to reimburse those residents impacted by the derailment for out-of-pocket expenses. Pet. App. 2a. There were 963 households located in the 1.3-mile radius, of which 827 households received compensation, and an additional 6,047 households in the 3-mile radius, of which 1,037 households received compensation. Pet. App. 2a. Speculating that three people to a household was a "fair number," Petitioner alleged that there were 15,000 potential plaintiffs within the 3-mile radius. Pet. App. 7a. Petitioner never provided the district court with any factual basis for determining the actual number of *people* in

either of those zones.[1] Indeed, Petitioner admitted in a letter to the district court that the estimate was based on personal belief, stating "they *believe* that 3 people to a household is a fair number." Pet. App. 21a. No basis for this "belief" was ever presented to the court; it was a number drawn from thin air.

B. Procedural History

The class definition in this case has been described by the Sixth Circuit as a "moving target," with seven different iterations presented by Petitioner over the course of the proceedings. Pet. App. 4a.

The district court denied Petitioner's efforts to certify a class on three separate occasions. The first motion for class certification, filed on August 21, 2003, was denied by the district court as premature. Pet. App. 3a. A renewed motion for class certification, with a new class definition, was filed on March 30, 2005. Pet. App. 3a. Following a full evidentiary hearing on the Rule 23 requirements, and taking into account Petitioner's post-submission modifications to that definition, the district court considered and rejected the class defined as:

> All persons (1) who evacuated their real property and/or "sheltered in place,"[2] and/or were pre-

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[1] Consequently, Petitioner failed to identify the number of *people* who fit within the definition of the proposed class.

[2] Petitioner refers to the phrase "shelter in place" in the fact section of his Petition and erroneously attributes the definition of that phrase to the magistrate judge. Pet. 8 n. 1. In fact, examination of the pleading referenced by Petitioner shows that definition was supplied by Petitioner, "Although the phrase is not particularly defined in the Third Amended Complaint, the plaintiffs' letter of June 15, 2005 [Doc. 95] states that 'shelter in place' means 'that if people chose not to leave their homes, then

> vented from returning to their homes and (2) who suffered all available nuisance damages, including economic losses and inconvenience, as a result of, and within a three mile radius from, the derailment and toxic spill.

Pet. App. 4a.

In its opinion, the district court acknowledged its obligation to conduct a "rigorous analysis" of the Rule 23 elements as prescribed by this Court in *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 161, 102 S.Ct. 2864, 2372, 72 L.Ed.2d 740 (1982). Pet. App. 25a. As part of that "rigorous analysis," several points were highlighted by the district court. First, Petitioner relied solely on information provided by Respondents as to the number of *households* in the area though the class was purportedly defined in terms of *persons*. Pet. App. 25a, 27a. Second, the district court expressed deep skepticism as to Petitioner's "fair number" estimate of the number of *persons* to a household. Pet. App. 25a. Third, Petitioner's claims were not as expansive as the proposed definition. Pet. App. 28a. Finally, the district court highlighted the limited geographic area of the proposed class, a 3-mile radius. Pet. App. 27a. The district court concluded that Petitioner failed to demonstrate impracticability of joinder, typicality, and adequate representation. Pet. App. 27a, 28a, 29a.

Petitioner renewed the motion to certify a class on February 14, 2007. The class Petitioner sought to certify at that point was "all persons who were evacuated from the surrounding area." Pet. App. 5a.

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they were to stay there and not come and go, while also turning off their air conditioning and closing all doors and windows.'" Pet. App. 30a.

The district court held a hearing and denied the motion, referring to the reasoning in the magistrate's report and recommendation. Pet. App. 5a.

In an unpublished opinion, the Sixth Circuit unanimously affirmed the findings of the district court. Focusing on the numerosity element of Rule 23, the court noted that impracticability of joinder requires some positive showing and cannot be purely speculative. Pet. App. 7a. Though ignored by Petitioner, a significant factor identified by the Sixth Circuit as supporting the district court's finding was that joinder was practicable due to the tight geographical proximity of putative plaintiffs to each other and the discrete and obvious nature of the harm. Pet. App. 6a. The Sixth Circuit classified the "speculative nature of Freeman's estimates" as a secondary factor supporting the district court's finding. Pet. App. 6a ("the speculative nature of Freeman's estimates *further demonstrates* that the district court did not abuse its discretion when it found that the class was not sufficiently numerous to merit certification."). As to the speculative nature of Petitioner's putative class size submission, albeit unnecessary to support the conclusion that Petitioner failed to demonstrate impracticability of joinder, the Sixth Circuit noted that Petitioner "cites large numbers, but his numbers include not just the members of his proposed class but every resident of the three-mile radius. Without 'some evidence of the size either of the excluded group or of the remaining class,' Freeman's evidence of numerosity remains speculative." Pet. App. 9a (internal citations omitted).

REASONS FOR DENYING THE PETITION

The decisions below do not conflict with any decision of this Court or that of any court of appeals and, as such, do not warrant further review. To the extent clarification may eventually be needed from this Court on class certification standards, this unpublished, factually dependent decision, involving a case characterized by its ever-morphing class definitions, is an unsuitable vehicle for establishing such a standard. Essentially, this case involves no more than an appropriate exercise of judicial discretion to deny a class where, after ample opportunity, the Petitioner has not and cannot adequately define the representative class, much less establish the prerequisites of Federal Rule of Civil Procedure 23.

1. Petitioner asks this Court to grant review because he contends that the decisions of the courts below conflict with *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974).

In *Eisen*, this Court held that the district court erred in its "resolution of the notice problems" of the class action by failing to comply with Rule 23(c)(2) in imposing the costs of notice on the defendants. *Eisen*, 417 U.S. 156 at 172-73. In passing the Court stated,

> We find nothing in either the language or history of Rule 23 that gives *a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action*. Indeed, such a procedure contravenes the Rule by allowing a representative plaintiff to secure the benefits of a class action *without first satisfying the requirements for it*.

Eisen, 417 U.S. 156 at 177 (emphasis added). Taken out of context, Petitioner misconstrues this statement to mean that no merits inquiry should ever be conducted as part of a Rule 23 analysis and thus that the plaintiff essentially has no burden to show that the requirements of Rule 23 have been satisfied. However, the "inquiry into the merits" statements in *Eisen* do not support Petitioner's position. First, and importantly, the *Eisen* class had already been certified under prongs (a) and (b) of Rule 23, thus the merits inquiry was not held in connection with "satisfying the requirements" of Rule 23(a), but rather in connection with the allocation of the costs of notice to potential class members. The Court's statement merely reflected that the merits inquiry into the plaintiff's potential likelihood of success was inappropriate at this stage of the proceedings. Second, this Court, rejecting the class's attempts to impose notice costs on the defendants, emphasized that a potential class plaintiff cannot "secure the benefits of a class without first satisfying the requirements for it." *Id.*

Petitioner acknowledges, but ultimately refuses to apply, this Court's post-*Eisen* decisions directed to the analysis of the actual requirements of Rule 23. Pet. 19, 27. In *Coopers & Lybrand*, this Court recognized that evidence pertaining to Rule 23's requirements is often "enmeshed in the factual and legal issues comprising the plaintiffs' cause of action," and that the "[e]valuation of many of the questions entering into determination of class action questions is *intimately involved with the merits* of the claims. . . ." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.12, 98 S.Ct. 2454, 2458 n.12, 57 L.Ed.2d 351 (1978)(emphasis added). Recognizing that "actual, not presumed, conformance with Rule 23(a) remains ... indispensable," this Court instructed that a class "may *only* be

certified if the trial court is satisfied, after *a rigorous analysis*, that the prerequisites of Rule 23(a) have been satisfied" and that it may often be necessary to "probe behind the pleadings before coming to rest on the certification question." *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 160-61 (emphasis added).

These decisions, when considered together, stand for the proposition that factual and legal issues may relate to both the merits of the underlying case and to the Rule 23 requirements. As noted by the Fifth Circuit, *Eisen* stands "for the unremarkable proposition that the strength of a plaintiff's claim should not affect the certification decision" and does not suggest "that a court is limited to the pleadings when deciding on certification." *Castano v. American Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996). Indeed, the Tenth Circuit has observed that the phrase "no merits inquiry" should not be "talismanically invoked to artificially limit a district court's reasoned determination of whether Rule 23's requirements have been met." *Vallario v. Vandehey,* 554 F.3d 1259, 1267 (10th Cir. 2009). Only by taking the statement in *Eisen* out of context and ignoring this Court's more direct holdings can Petitioner claim any error. Clearly, that is no basis for granting certiorari.

With the above principles in mind, the decision of the Sixth Circuit affirming the district court, did not violate, deviate, or depart from any holding of this Court. The Sixth Circuit correctly held that the District Court did not abuse its discretion when it acknowledged this Court's mandate and properly conducted a "rigorous analysis" for the purpose of evaluating whether Petitioner met the requirements of Rule 23(a). Pet. App. 25a; *Falcon*, 457 U.S. 147 at 160-161. The Sixth Circuit's use of the word "con-

crete" cannot bear the weight Petitioner attaches to it because the term does no more than stand for the unremarkable proposition that the proof required could not be merely "speculative." *See Falcon*, 457 U.S. 147 at 158 (cautioning against drawing inferences); 7A Charles Alan Wright, Arthur R. Miller and Mary K. Kane, *Federal Practice and Procedure* §1762 (3d ed. 2005).

2. Petitioner points to an illusory conflict between circuits interpreting *Eisen* and the standard of proof for class certification motions.[3] Pet. 21-27. As noted by this Court in *Falcon*, class actions may only be certified if, after rigorous analysis, the trial court is *satisfied* that the prerequisites of Rule 23 have been met. In trying to manufacture a conflict, Petitioner ignores the broad discretion granted to district courts within the Rule 23 framework. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 345, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979) (district courts have "broad power and discretion ... with respect to matters involving the certification" of class actions); *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 559 (6th Cir. 2007) (district court "maintains substantial discretion" and possesses "the inherent power to manage and control its own pending litigation"), *cert. denied*, 129 S.Ct. 608 (2008).

Petitioner suggests that lower courts, mainly at the district court level, have difficulty reconciling this Court's decisions in *Eisen* and *Falcon*. Pet. 20-21. Citing district court cases such as *Harman v. LyphoMed, Inc.*, 122 F.R.D. 522 (N.D. Ill. 1988), and *In re IGI Securities Litigation*, 122 F.R.D. 451

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[3] Notably, Petitioner does not separately argue that certiorari is warranted to resolve any conflict among the lower courts, which speaks volumes about the weakness of this argument.

(D. N.J. 1988), to support his argument, Petitioner ignores subsequent decisions by the appellate courts over those districts, which reflect no difficulty in applying this Court's decisions. *See Johnston v. HBO Film Management, Inc.*, 265 F.3d 178, 188 (3d Cir. 2001), *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 675-676 (7th Cir. 2001), *cert. denied*, 534 U.S. 951 (2001). One decision cited by Petitioner does not relate to an analysis of Rule 23 requirements, while another acknowledges this Court's statement in *Falcon*. *See Armstrong v. Weichert Realtors*, 2006 WL 1455781 (D. N.J. 2006)(addressing class certification under Fair Labor Standards Act, 29 U.S.C. §216(b)); *Kane v. United Independent Union Welfare Fund*, 1998 WL 78985 (E.D. Pa. 1998)(acknowledging that certification is appropriate if the court is satisfied that Rule 23 requirements are met after "rigorous analysis"). The remaining cases cited by Petitioner on this point actually pre-date *Falcon*. *See Blackie v. Barrack*, 524 F.2d 891 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976); *Gilchrist v. Bolger*, 89 F.R.D. 402 (S.D. Ga. 1981), *aff'd*, 733 F.2d 1551 (11th Cir. 1984); *Brinkerhoff v. Rockwell Intern. Corp.*, 83 F.R.D. 478, 481 (N.D. Tex. 1979); *Briggs v. Brown & Williamson Tobacco Corp., Inc.*, 414 F.Supp. 371 (E.D. Va. 1976).

Even more non-existent is any inter-circuit conflict. The circuit courts have all acknowledged *Eisen* and the legal standard set out by this Court in *Falcon*. Petitioner correctly notes that the Second, Fourth, Fifth and Seventh Circuits recognize the "rigorous analysis" required by this Court which may overlap with the merits inquiry. *In re Initial Public Offerings Securities Litigation*, 471 F.3d 24, 40-41 (2d Cir. 2006), *reh'g denied*, 483 F.3d 70 (2d Cir. 2007); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 365-366 (4th Cir.

2004); *Unger v. Amedisys Inc.*, 401 F.3d 316, 320-21 (5th Cir. 2005); and *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 675-77 (7th Cir. 2001). Although Petitioner suggests that other circuits employ differing standards, that is wishful thinking on his part. The First, Third, Eighth, Tenth and Eleventh Circuits have all recognized the rigorous analysis required by this Court and the need for analysis relating to the Rule 23 requirements even where those findings overlap the merits inquiry. *See, e.g., Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 297-98 (1st Cir. 2000); *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305, 309 (3d Cir. 2008); *Elizabeth M. v. Montenez*, 458 F.3d 779, 786 (8th Cir. 2006); *Shook v. El Paso County*, 386 F.3d 963, 968 (10th Cir. 2004), *cert. denied*, 544 U.S. 978 (2005), and *Vallario v. Vandehey*, 554 F.3d 1259, 1266-67 (10th Cir. 2009); and *Rutstein v. Avis Rent-A-Car Systems, Inc.*, 211 F.3d 1228, 1234 (11th Cir. 2000), *cert. denied*, 532 U.S. 919 (2001).

Petitioner cites to the Ninth Circuit's decision, *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1227 (9th Cir. 2007), *reh'g en banc granted*, 556 F.3d 919 (9th Cir. 2009), as being "at the other end of the spectrum" in holding that "arguments evaluating the weight of evidence or the merits ... are improper at the certification stage." Pet. 24. Petitioner's statement ignores at least two salient points. First, after a petition for rehearing was filed in the original opinion of *Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214 (9th Cir. 2007), *withdrawn*, 509 F.3d 1168 (9th Cir. 2007), wherein the court shied away from resolving conflicting evidence of a class certification petition, the panel amended its opinion to note that "courts are not only at liberty to but must consider evidence which goes to the requirements of Rule 23 at the

class certification stage even if the evidence may also relate to the underlying merits of the case." *Dukes*, 509 F.3d 1168 at 1177 n.2 (9th Cir. 2007). Second, the Ninth Circuit has granted *en banc* rehearing in *Dukes* to address the very issue of merits inquiry. *Dukes*, 509 F.3d 1168 (9th Cir. 2007), *reh'g en banc granted*, 556 F.3d 919 (9th Cir. 2009). If the Ninth Circuit ultimately adopts a rule that deviates from the other Circuits, this Court no doubt will have the opportunity to review that decision. That potential conflict presents no reason to review the narrow holding in this case.

The Sixth Circuit is squarely in line with its sister circuits, recognizing this Court's instruction to conduct a "rigorous analysis" into Rule 23 requirements and acknowledging that the analysis may necessarily overlap with facts that would tend toward the merits inquiry. *See In re Am. Med. Sys., Inc.*, 75 F.3d 1069 (6th Cir 1996)(recognizing need to conduct a "rigorous analysis" and noting that a determination as to maintainability as a class action "should be predicated on more information than the pleadings will provide"). The decision in this case does not depart from that legal standard. Here, the Sixth Circuit found that Petitioner failed to "demonstrate affirmatively" the impracticability of joinder as a prerequisite to certification, basing its finding primarily on the tight geographic proximity of putative plaintiffs and the discrete and obvious nature of the harm and secondarily on the speculative nature of the class size. Pet. App. 5a, 6a. That inherently fact-based determination presents no issue warranting further review.

3. Petitioner argues that the Sixth Circuit deviates from accepted standards "for determining numerosity

and impracticability of joinder." Pet. 12. The Sixth Circuit began its analysis of the Rule 23(a) numerosity requirement by explaining a misconception to which Petitioner has apparently fallen victim. It noted that "[w]hile this requirement is commonly referred to as a 'numerosity' requirement, the real issue is whether the plaintiff seeking class certification has demonstrated impracticability of joinder." Pet. App. 6a. Though ignored by Petitioner, the main factor identified by the Sixth Circuit as supporting the district court's finding was that joinder was practicable due to the tight geographical proximity of putative plaintiffs to each other and the discrete and obvious nature of the harm. Pet. App. 6a. Consequently, these potential plaintiffs could be relatively easily identified and contacted, thus Petitioner did not show that joinder was impracticable. The focus of Petitioner's argument——the court's rejection of his assumption regarding class size—is irrelevant as there is an alternative basis for supporting the holding of the Sixth Circuit.

The inquiry into class size conducted by the Sixth Circuit did not impose a heightened burden on Petitioner or deviate from accepted standards. In line with this Court's decision in *Falcon,* which cautioned against accepting inferences, the Sixth Circuit required that "impracticability of joinder ... be positively shown, and cannot be speculative." Pet. App. 7a (citation omitted). To establish impracticability of joinder, the Petitioner alleged that 15,000 potential class members existed based on his unsupported and undocumented "belief" that three people to a household in the affected area was a fair number.[4] Pet. 9.

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[4] Petitioner acknowledges that a number of households were compensated by Respondents following the incident and would

Petitioner acknowledges that while speculation is insufficient to fulfill this requirement, "some evidence or *reasonable estimate* of the number of purported class members" must be shown. Pet. 13 (citing *Pederson v. La State Univ.*, 213 F.3d 858, 868 (5th Cir. 2000)). Both lower courts recognized that Petitioner's "belief" was based on data from Respondents as to the number of *households* while the class definition was in terms of *persons*. Pet. App. 6a-7a; 23a, 25a. Both lower courts recognized that the class Petitioner sought to certify was actually a smaller subset of this unsubstantiated total. Pet. App. 7a-8a, 27a. That neither the Sixth Circuit nor the district court found, following their rigorous analysis of the Rule 23 elements, Petitioner's "belief" to be a "reasonable estimate" signals an appropriate exercise of discretion, not a departure from federal standards or the imposition of a heightened burden. In any event the issue clearly does not warrant certiorari.

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not be part of the class. Pet. 12. While Petitioner argues that it is reasonable to assume that these households all suffered damage, ignoring this Court's caution in *Falcon* against drawing such inferences, an equally valid inference would be that the households remaining uncompensated suffered no damages.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should not be granted.

Respectfully submitted,

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